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# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1885.**

No. ~~365.~~ 96

WILLIAM A. PURDY, PLAINTIFF IN ERROR,

*vs.*

THE TOWN OF LANSING.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

**FILED OCTOBER 10, 1885.**

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United States Circuit Court for the Northern District of New York.

WILLIAM A. PURDY
*against*
THE TOWN OF LANSING.

To the above named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Morrison R. Wait, Chief Justice of
1 Supreme Court of the United States, at the city of Utica, this 26th day of July, in the year one thousand eight hundred and seventy nine.

[SEAL.] W. H. BRIGHT, *Clerk.*

JAMES R. COX,
*Plaintiff's Attorney, Auburn, N. Y.*

(Endorsed:) United States Circuit Court, northern district of New York. William A. Purdy *vs.* The Town of Lansing. Summons return; James R. Cox, plaintiff's attorney. To the defendant within named: Take notice, that upon default judgment will be taken for the sum of eight thousand dollars, in money, with
2 interest from the 14th day of July, 1879, besides costs. Jas. R. Cox, plaintiff's attorney, 92 Genesee st., Auburn, N. Y.

1½ U. S. Circuit Court, north'n dist. New York.

WILLIAM A. PURDY
*vs.*
THE TOWN OF LANSING.

STATE OF NEW YORK, } *ss.*
*Cayuga County,*

Gardner C. Gifford, of the town of Lansing, in said district, being duly sworn, says that he is personally acquainted with David Crocker, of said town, and knows him to be the Supervisor of said town, and that on the 29th day of July, 1879, he personally served on the said Crocker, Supervisor, at his (the said Crocker's) resi-
3 dence in said town, the summons hereto annexed, by showing the same to him, exhibiting the seal thereto affixed and the notice thereon endorsed, by handing to him and leaving with him true copies thereof, and also handing to him and

leaving with him a copy of the declaration or complaint in the above entitled cause.

GARDNER C. GIFFORD.

Subscribed and sworn before me this 7th day of August. 1879.

HORACE T. COOK,
*Notary Public, Cayuga County.*

(Endorsed:) Wm. A. Purdy *vs.* Lansing; service and proof of service; Jas. R. Cox, pl'ff's att'y, Auburn.

Pleas in the Circuit Court of the United States of the
4 northern district of New York, of October term, 1878, that is to say, of July, 1879.

WILLIAM A. PURDY
*vs.*
THE TOWN OF LANSING.

William A. Purdy, a citizen of the United States and of the state of Iowa, by James R. Cox, of Auburn, in the said northern district of New York, his attorney, plaintiff in this action, proceeding by declaration duly filed, and not by writ, complains of the said "The Town of Lansing," defendant, and says that the said defendant is a municipal corporation, being a town in and of the county of Tompkins, adjoining and near to the counties of Cortland and of
5 Cayuga, in said district, and that during the years 1870, 1871 and 1872, a certain railroad company, known and recognized as "The New York and Oswego Midland Railroad Company," duly incorporated, maintained, and, assisted by the various statutes of the said state authorizing the incorporation and management of railroad corporations, was actually engaged in locating, constructing, and running its railroad track and branches in and near to the said town of Lansing, defendant.

That under and in pursuance of certain acts of the legislature of said state, hereinafter described, the said defendant was in certain circumstances and under certain conditions authorized and empowered to subscribe to the stock of the said railroad
6 company, and to issue the bonds of the town in payment of such stock subscription; which acts are known and described as follows:

Chapter 398 of the laws of 1866.
Chapter 917 of the laws of 1867.
Chapter 61 of the laws of 1868.
Chapter 84 of the laws of 1869.
Chapter 298 of the laws of 1871.

The terms and conditions, circumstances and restrictions in respect to the issuing of such bonds, as provided by said acts, were in brief substantially as follows:

1st. The amount of such bonds to be determined by the
7 assent in writing of a majority of the taxpayers of such town, owning or representing (as agent, president or otherwise, including owners of non-resident lands) more than one-half of the taxable property of said town, assessed and appearing upon the assessment roll of the year 1868; but such amount was not to exceed 30 per cent. of the assessed valuation of the whole town.

2d. The term such bonds were to run was not to exceed 30 years, and the rate of interest not to exceed seven per cent.

3d. Such assents to be proved or acknowledged in the same manner as conveyances of real estate, and prior to December 31st, 1875, and were to state the amount of money authorized to be raised.

8 4th. The bonds so to be issued to be in any form considered expedient, but were not to be sold or disposed of at less than their par value, but might be issued direct to the said railroad company in payment at par for the railroad stock subscribed for by the commissioners; such commissioners were to be appointed by the county judge of the county upon the written application of twelve freeholders, residents of the town, to carry into effect the provisions of the acts above described, and to subscribe for the stock of said railroad company in behalf of their town, provided the requisite assents of the taxpayers were duly obtained.

9 5th. The fact of the requisite majority of persons and property having so executed their several assents to such subscription for stock and such issue of bonds was to be proved by the written affidavit of the assessors of the town or of the town clerk or county clerk, to be endorsed upon or annexed to the written assents aforesaid, and filed in the town clerk's office of such town, and a copy thereof in the county clerk's office of the county, and a certified copy of such affidavit so filed to be evidence of the facts therein contained and admitted as such in any court of justice in this state, and before any judge or justice thereof.

10 And the plaintiff further states that in pursuance of the said statutes above described, and on the proper application of freeholders of said town to the county judge of the county of Tompkins, he, the said county judge, did, on or about the 21st day day of October, 1871, duly appoint in writing three freeholders of said town, that is to say, Egbert Williams, Charles G. Hagin and J. Bruyn Bogardus, as commissioners under said statutes to carry into effect the provisions thereof, who thereupon duly qualified to the said office.

And afterwards, and on or about the 9th day of October, 1871, the requisite assents and consents of the taxpayers of said
11 town of Lansing, as required by the statutes aforesaid, having been duly obtained, to the effect that the town of Lansing might aid the construction of the said railroad by subscribing for $100,000 of the stock of said railroad company, and that the bonds

of said town might be issued to that amount, which was less than ten per cent. of the assessed value of the real and personal property of said town, to pay such subscription, the requisite proofs of such assents as provided by said statutes was duly made by affidavit of the three assessors of said town of Lansing and duly filed in the offices of the town clerk of Lansing, and also in the office of the county clerk of said county of Tompkins, on or about the
12 12th day of October, 1871, with the said consents.

By the terms and conditions or such assents, a certain portion, that is to say, one-fourth part or $25,000 of said bonds, were to be reserved for a special purpose of carrying a branch of said railroad into the village of Ithaca, in said county of Tompkins, leaving only the sum of $75,000 of the bonds of said town applicable to the extending and constructing said railroad into and through the said town of Lansing and county of Tompkins.

And thereupon, afterwards, the requisite assents being fully obtained and the requisite proof thereof as provided by said acts of the legislature being duly made and filed, and the said com-
13 missioners being duly qualified in pursuance of their office, and duly did, on or about the 1st day of December, 1871, duly subscribe for 750 shares of the stock of the said railroad company in behalf of the said town of Lansing; and, thereupon, on or about the same time, they did receive from the said railroad company, for and in behalf of said town, the several scrip certificates for seven hundred and fifty shares of the capital stock of said railroad company, each share being $100, of par value, and thereupon duly executed and delivered under their hands and seals to the said railroad company, in payment for said stock at par, certain of the said bonds of said town so authorized, as aforesaid, by the statutes
14 and the taxpayers, amounting in all (the bonds being of different amounts, some of $1,000, some of $500, and some of $100) to the said sum of $75,000, being in full for the said stock subscription and for said scrip certificate.

To each of the said bonds there were appended the usual coupons or interest warrants for semi-annual interest, each duly signed by one of said commissioners, as hereinafter set forth.

And thereupon, afterwards, the said railroad company sold and disposed of the said bonds and coupons for the money to various purchasers; and afterwards certain of said bonds and coupons came into plaintiff's possession and ownership by purchase in the
15 usual course of business, for value paid, and the plaintiff now owns and holds the same.

That said plaintiff for a 1st cause of action states to the court that on or about the December, 1871, the said defendant being a municipal corporation as aforesaid, duly organized under the laws of the state of New York, executed and delivered in connection with one of said bonds a negotiable instrument in writing, commonly called a coupon, of which the following is a copy:

$35.00.]

The town of Lansing, Tompkins county, N. Y., will pay the bearer hereof at the Tompkins County National Bank, in Ithaca, thirty-five dollars, on the first day of March, 1874, for interest due at that date on bond No. 132.

16 (Signed) CHAS. G. HAGIN, *Commissioner.*

That said instrument in writing was duly presented to said National Bank for payment, when the same by the terms thereof became due and payable, and payment thereof was demanded and refused.

That the said defendant, although legally bound to pay the same, has hitherto wholly neglected so to do, whereby an action hath accrued to the plaintiff, who is now the lawful owner and holder of said coupon, to recover the said sum of thirty-five dollars, with interest from the 1st day of March, 1874.

[Note by clerk Supreme Court U. S., per stipulation of counsel: (See page 285.) "Here follow 175 other counts, each upon
17 a separate coupon, amounting in all to $6,160, besides interest."]

Wherefore this plaintiff brings here into this honorable court the said several coupons above described to be surrendered to said defendant, and thereupon asks the judgment of this court against the said defendant for the sum of six thousand one hundred and sixty dollars, together with interest upon each of said coupons so in default since the same became due; that is to say, in all for the sum of eight thousand dollars, besides the costs and disbursements of this action.

JAS. R. COX,
*of Auburn, N. Y., Pl'ff's Att'y.*

(Endorsed:) No. 2097; U. S. Circuit Court, north'n dist. of N. Y.; William A. Purdy *vs.* The Town of Lansing; declara-
18 tion; Jas. R. Cox, pl'ff's att'y, Auburn, N. Y.; filed July 26, 1879.

Circuit Court of the United States, northern district of New York, Oct. term, 1879.

WILLIAM A. PURDY
*vs.*
THE TOWN OF LANSING.

To the declaration or complaint of the plaintiff herein, and the matters therein set forth, the defendant, the said town of Lansing, by M. Goodrich, its attorney, makes answer as follows:

*First.* The defendant admits its organization as one of the towns in Tompkins county, in the state of New York, for the purpose of town municipal government under the laws of said state.

19 But the defendant alleges that said town had not, by virtue of its said organization, any power or capacity whatever to issue bonds or to obligate itself, or to become obligated upon any issued or professedly issued on its behalf in aid of the construction of any railroad.

The defendant also admits the passage by the Legislature of said state of the several acts specified and mentioned in said complaint, not, however, admitting their provisions as therein set forth, but for the same, reference is herein made to said acts appearing in the published printed statutes of the said state. And the defendant alleges that the said legislature on the 20th of April,
20 1866, passed the further act designated as chapter 695 of the laws of that year, to which like reference is made for the provisions thereof. And the defendant admits and alleges that on or about January 11th, 1866, the said New York & Oswego Midland Railroad Company, mentioned in the complaint, was organized pursuant to the laws of said state for the purposes of constructing, owning, maintaining, and operating a line of railroad from the city of Oswego, in said state, to the state line of the state of New Jersey, and thence to a point on the Hudson River opposite to the city of New York, in the said state of New York, and that the line of said railroad became and was located and es-
21 tablished prior to May 15, 1867, upon which line the said railroad was constructed and has since been operated. and the same lies far to the east of the county of Cortland in the said state of New York. That said Tompkins County adjoins Cayuga county in said state on the south, and they both adjoin Cortland county on the west; that there were at the city of Auburn, in said Cayuga county, and at the village of Cortland, in said Cortland county, existing railroad facilities, aside from the said New York & Oswego Midland railroad and its branches, amply sufficient for all business seeking the said city of Auburn from the south and said village of Cortland from the west, so that, as the de-
22 fendant avers, the construction of any branch or extension of the said New York & Oswego Midland railroad from the line thereof to the said village of Cortland, and thence through the said counties of Cortland and Cayuga to the said city of Auburn, was not and could not be of any interest or importance whatever to the inhabitants of the said town of Lansing.

And the defendant further admits and alleges, that the said railroad company was authorized, first, by the said act, chapter 917, then again by the said act chapter 84, in the discretion of its board of Directors, to construct an extended or branch railroad from any point on the line of its road in either of the counties of Chen-
23 ango or Madison (which are to the east of the said counties of Cortland and Cayuga) through the said counties of Chenango, Madison, Cortland and Cayuga, or through these

counties and also the county of Onondaga, (which is to the north of said Cortland county, and remote from said Tompkins county,) to the said city of Auburn; and that by the last mentioned acts aforesaid certain of the towns of such last mentioned counties, through which said railroad should be located, were authorized and empowered to bond themselves in aid of the construction thereof, in manner and by proceedings such as are authorized in that behalf in the aforesaid act chapter 398. But the defendant denies that any such power, authority or capacity so to bond itself
24 was by either of those acts, or any other acts, or any other act of the said legislature whatever, ever conferred upon the said town of Lansing.

And further defendant admits and alleges that the said legislature, in and by the aforesaid act, chapter 298 of the laws of 1871, granted to the said railroad company the authority and power to extend and construct its said railroad from the said city of Auburn or from any point on its road easterly or southerly from said city upon such route and location, and through such counties as its board of directors should deem most feasible and favorable for the construction thereof, to any point on Lake Erie or the
25 Niagara River, and in and by the same act, power and authority were granted to any town, village, or city in any county through or near which said railroad or its branches should be located, (excepting such as were excepted from the provisions of the general bonding law of said state) to bond itself in aid of the construction of such branch or extension of said railroad, in manner and by proceedings such as are authortzed in that behalf in and by the aforesaid act chapter 398, which said franchise so granted the defendant alleges the said railroad company did not in any manner accept, otherwise nor until by the resolution of its board of directors adopted on or about November 16, 1871,
26 whereby it was only resolved and determined that the construction and extension of said branch or extended railroad so authorized by said last mentioned act, should be commenced at the said village of Cortland and be thence extended westerly to Lake Erie or the Niagara River. But the defendant avers that said resolution was not a sufficient acceptance of said franchise by said railroad company, and that said company never accepted the same, and never located any line or route upon which to construct such branch or extended railroad from the said village of Cortland to the western terminus, as fixed and designated by said last mentioned act, or to that terminus from any other authorized
27 point of commencement, so as to render the grant of authority and power made by that act operative and available to the said town of Lansing so to bond itself in aid of the construction of any such branch or extended railroad aforesaid.

*Second* And for a second answer or ground of defense the defendant denies each and every allegation of said complaint or dec-

laration, except such as are hereinbefore or are hereinafter expressly admitted or alleged.

*Third.* For a third answer or ground of defense to the matters set forth in the plaintiff's complaint the defendant alleges that in the year 1871 and afterwards the controlling officers of said
28 New York and Oswego Midland Railroad Company, acting professedly for and in behalf of said company, united and agreed with one Charles P. Wood, who was owner of an old partially graded railroad bed extending through the said town of Lansing and certain towns in said Cayuga county, for the purchase of said road-bed by said company of said Wood at and for a price greatly exceeding the real value thereof, to wit: $80,000, and also for constructing a railroad commencing at Freeville, in said Tompkins county, (ten miles and upwards to the west of said village of Cortland, and that or a much greater distance from the said New York & Oswego Midland Railroad, or any of its branches)
29 and thence to be extended northwesterly so as to reach and to occupy such road-bed aforesaid for as great a distance as possible, provided, however, that said town of Lansing and certain towns along the line of said road-bed in said Cayuga county, including the said city of Auburn, could be induced to and should bond themselves in aid of the construction of such railroad, as a branch or extension of the said New York & Oswego Midland Railroad, in the aggregate of $680,000 — $100,000 thereof being the specified amount for which the said town of Lansing should so bond itself, in order to the consummation and carrying out of such agreement.

30 And the defendant alleges that it was in aid of the construction of the railroad so arranged to be built from Freeville as aforesaid, and not otherwise, that the said application of freeholders of the said town of Lansing and the said assents and consents of taxpayers therein, which are mentioned in said complaint, were procured to be, and in fact were, made and given, and that the bonds mentioned therein were created and issued.

And the defendant avers that said bonds, with the coupons thereto attached, are and were, by reason of the premises, wholly unauthorized and void.

31 *Fourth.* And for a fourth answer or ground of defense to the matters set forth in the plaintiff's complaint, the defendant alleges that the said assents and consents of taxpayers of the said town of Lansing, which are mentioned in said complaint, are and were made up and consist of two sets of assents and consents of taxpayers in writing, containing substantially, different provisions in respect to the railroad to be built, and in aid of the construction of which such assents for the bonding were given, to wit: one set being assents to the bonding of the said town to the amount of $100,000, in aid of the construction of the said

New York & Oswego Midland Railroad and its branches, and the other set being the same, but containing a further provision that of the $100,000 of bonds to be created and issued in the bonding assented to, $25,000, thereof should be held by the commissoners creating and issuing the same, to be applied in aid of the construction of a railroad direct to Ithaca, which is and was a line of railroad not contemplated or authorized in any of the acts of legislature aforesaid.

And the defendant alleges that neither of said sets of assents and consents alone contained the requisite majority in number and value of property owned or represented of the taxpayers of the said town of Lansing, as required by said acts aforesaid, to authorize the issuing of the bonds mentioned in said complaint, and that the set secondly above mentioned containing the further provision aforesaid was resorted to and obtained because without that unauthorized provision being therein inserted, the assents thereto given could not be obtained; and that when the same were by that means obtained, the two sets were wrongfully and improperly joined as one and the same set of assents of taxpayers, and as such were wrongfully and improperly proved and acted upon for the bonding of said town, counted on in the said complaint, as manifestly appears from the said assents and consents recorded and filed, as therein set forth.

And by reason of the premises the defendant avers that the said bonds and coupons sued on are and were unauthorized and void.

*Fifth.* For a fifth answer or ground of defense to the matters set forth in the plaintiff's complaint, the defendant alleges and charges that the said alleged commissioners named in the said complaint did not, nor did either of them ever qualify as such commissioners or commissioner, as required by the acts aforesaid, and that the said alleged bonds mentioned in the said complaint and upon coupons from which the plaintiff sues, were and are, each and every of them, created and issued, if at all, without being sealed with the individual seals of the said commissioners as required by said act chapter 398, and were and are created and issued, each and every of them, to run before maturing longer than thirty years, and were and are each and every of them, created and issued to draw interest at seven per cent. payable by the terms of said bonds semi annually instead of annually, as alone authorized by the said act, to the prejudice of the said town of Lansing and in violation of the provisions of said acts; and each and every of the said coupons sued on by the plaintiff are for such authorized payments of semi-annual interest. For which cause or causes the defendant avers that said bonds and coupons are, and each and every of them is, unauthorized, illegal and void.

*Sixth.* And for a sixth answer or ground of defense to the matters set forth in the plaintiff's complaint, the defendant admitting the residence of the plaintiff to be as therein stated, alleges that the said bonds and coupons mentioned therein, and which are sued on by the plaintiff, are really owned by one Howell, as administrator or otherwise, who is a resident of said state of New York, or by
37 some other person or persons, corporation or corporations, unknown to the defendant, but who are resident in the said state of New York; that the plaintiff took whatever title he has to such bonds and coupons, and to each and every of them, long after dishonor and with notice of the defenses herein set forth; that such title was acquired by the plaintiff not in the usual course of business nor for value; that in fact and in truth the plaintiff has no real beneficial ownership of said bonds and coupons, or of any of them, but that his alleged title thereto arises from a nominally formal transfer thereof to him because of his residence outside
38 of the said state of New York, and to enable him for that reason to prosecute this action thereon in this court, and the same is so prosecuted by him solely for the benefit of the real owner or owners aforesaid, upon the understanding and agreement between him and them that he or they shall save him harmless from all prejudice arising from the prosecution thereof.

So that the defendant avers that the plaintiff William A. Purdy is not entitled to bring or to maintain this action as a party plaintiff in this court.

Wherefore the defendant prays judgment, that the plaintiff's declaration or bill of complaint be dismissed, with costs.

M. GOODRICH,
*Def't's Att'y, Auburn, N. Y.*

(Endorsed:) 2097; U. S. Circuit Court, northern dist. of
39 N. Y. William A. Purdy *vs.* The Town of Lansing; defendant's plea or answer; M. Goodrich, def't's att'y, Auburn, N. Y., filed Aug't 26, 1879.

United States Circuit Court, northern district, New York.

*Bill of Exceptions.*

WILLIAM A. PURDY
*vs.*
THE TOWN OF LANSING.

This cause came on for trial at a regular term of this court held at the city of Utica, in said district, on the 18th day of March, 1885, before Hon. Wm. J. Wallace, Circuit Judge, without a jury, a jury being waived by written stipulation, duly executed by the attorneys for the respective parties, and filed with the clerk.

And thereupon the parties offered certain proofs by documents and testimony, tending to show the facts following; which, after due consideration thereupon, the said court found, decided and adjudged, that is to say:

UNITED STATES CIRCUIT COURT.

NORTHERN DISTRICT N. Y.

UTICA, March 18, 1885.

WILLIAM A. PURDY
*vs.*
THE TOWN OF LANSING. } Facts and Conclusions by the Court.

This action having been brought to trial, and a trial had by the Court without jury, a trial by jury having been expressly waived by the written stipulation of the parties, after hearing the allegations and proofs of the respective parties, and the argument of their counsel, the Court finds as facts:

*First.* The plaintiff is, and at the time of commencement of this action was a resident of the state of Iowa, and a citizen of said state and of the United States; the defendant, the "Town of Lansing," is and was a municipal corporation, and one of the towns of Tompkins county in said northern district of New York, and a citizen of the state of New York.

*Second.* The Legislature of the state of New York on April 5, 1871, passed an act, entitled An Act to authorize the New York & Oswego Midland Railroad Company "to extend its "road, and to facilitate the construction thereof." (Laws of New York, 1871, Volume I, Ch. 298, page 586.)

By section one of said act it is provided as follows:

"The New York & Oswego Midland Railroad Company are here-
"by authorized and empowered to extend and construct their rail-
"road from the city of Auburn, or from any point on said road
"easterly or southerly from said city, upon such route and location,
"and through such counties as the Board of Directors of said
"company shall deem most feasible and favorable for the
"construction of said railroad, to any point on Lake Erie or
"the Niagara River." * * * (Then follow provisions for constructing other branches; then follows this:) "And any town, vil-
"lage or city in any county through or near which said rail
"road or its branches may be located, except such counties, towns
"or cities as are excepted from the provisions of the general bond-
"ing law, may aid or facilitate the construction of the said New
"York & Oswego Midland Railroad and its branches and exten-
"sions, by the issue and sale of its bonds in the manner pro-
"vided for," in the said act of 1866, and the acts "amendatory
"thereof and supplementary thereto."

The act of 1866, referred to, is the act of April 5, 1866, (Vol. I, Chap. 398, page 874, of the Laws of the State of New York of 1866,) to which reference is hereby made. The said town of Lansing is not a town excepted from the provisions of said general bonding law.

On May 15, 1867, the said Legislature passed the further act, (Laws of New York, 1867, Chap. 917, page 2291), and by
45 section 3d of said act as amended by section 4 of the act of March 31, 1869 (Laws of New York, 1869, Chap. 84, p. 142), said company was authorized "to construct a branch railroad from "the line of the said road at any point in the counties of Chenango "or Madison, through the counties of Chenango, Madison, Onon- "daga, Cortland, Cayuga, to the city of Auburn in the county of "Cayuga, whenever in the judgment of the Directors the same shall "be for the interest of said corporation." And by said act, the same authority to the towns along the line of the said branch road, or interested in the construction thereof, to issue bonds in
46 aid of the construction of said road, and to subscribe for the stock of said company, was conferred, as is conferred by the said acts of 1866 and 1867.

*Third* Prior to 1869 the said the New York & Oswego Midland Railroad Company was organized under the laws of New York, and its main line was located from the city of Oswego, in a generally southeasterly direction, terminating at a point on the western shore of the Hudson River opposite the city of New York. It was constructed and operated on said line.

47 This main line lies about 35 miles to the east of the east line of Tompkins county.

In 1870 the said company had constructed and built a branch from Norwich on its main line westward to the village of Cortland, which is south and east of Auburn, and was running its cars thereon in 1871. That part of this branch between Norwich and De Ruyter was built under the act of 1867, as amended in 1869, and was built with the intention, at the time, of going to Auburn, and not through Tompkins county at all.

48 *Fourth.* The Board of Directors of the said Midland Company, on the 16th of November, 1871, passed the following resolution:

"WHEREAS, The New York & Oswego Midland Railroad Com- "pany had for its original object the construction of a railway from "the city of New York to the city of Oswego, and

"WHEREAS, Since the organization of said Railroad Company, it "has become desirable to extend their said railroad to Lake Erie or "the Niagara River:

"WHEREAS, The Legislature of the state of New York
49 "did, by Chap. 298 of the Laws of 1871, authorize and "empower the said New York & Oswego Midland Railroad

"Company to build and extend their said railroad from the city of "Auburn, or from any point easterly or southerly of said city, to "any point on Lake Erie or the Niagara River. And

"WHEREAS, The said Railroad Company and its Board of Di- "rectors have decided to begin such extension and construction of "said railroad westerly at and from the village of Cortland, in the "county of Cortland, and westerly to Lake Erie or the Niagara "River. Therefore, be it

50 "*Resolved*, That the Board of Directors of said Railroad "Company hereby determine that the construction and ex- "tension of the said railroad westerly commence at and from the "village of Cortland, in the county of Cortland, and thence to Lake "Erie or the Niagara River."

*Fifth.* On the same 16th day of November, 1871, the Board of Directors of said company passed the following resolution:

"*Resolved*, That the said New York & Oswego Midland Railroad "Company, for the purpose of obtaining money and mate-
51 "rials necessary to extend their said railroad from the vil- "lage of Cortland to Lake Erie or the Niagara River, hereby "authorize and direct its President and Treasurer to borrow money "to an amount not exceeding twenty five thousand dollars per mile "in length of the track of the said railroad, so as aforesaid to be "extended and constructed; and to secure the repayment thereof, "to issue its first mortgage bonds to be made payable in gold coin "of the United States, and to be of such denomination, and after "such manner and form, and to such trustees, as the said President "may determine upon and deem best for the interests
52 "of the said company."

*Sixth.* Some twenty years prior to the year 1872, a road bed, six- teen miles long, called the "Murdock Line," intended for a rail- road, had been graded.

That road bed ran from a place called "Osmun's," in the town of Lansing, northward through said town of Lansing to the north line of said town of Lansing, which is the south line of the county of Cayuga, and of the town of Genoa in that county; and then north- ward through Genoa and the town of Venice into the town of Scipio, all in Cayuga county.

53 The grading of that road bed had become grassed over, and the culverts were decayed. Some part of it was ready for ties and ballasting.

On the 1st of January, 1871, the Executive Committee of the said Railroad Company purchased for said company the said Mur- dock line, with its franchises, right of way and road bed.

During the summer and fall of 1871 surveys were made by the said company for two lines of railroad, one from Truxton, and one from East Homer, both in a northwestern direction, and

54 both to the north and east of Tompkins county and not touching it. A survey was also made by said company for a line of railroad to run from Freeville to the town of Dryden, Tompkins county, the town next south of Lansing, through the southerly part of the said town of Lansing to the south end of said Murdock line at Osmun's, in the town of Lansing, a distance of ten miles.

As a result of this acquisition and of their last survey, bonding proceedings were commenced, and the resolution of the board of directors of said company, of November 16, 1871, hereinbe-
55 fore set forth, was passed.

On the 13th of December, 1871, there was filed in the office of the Clerk of the county of Tompkins, a map called "Map "No. 1," certified by the directors of said railroad company as required by law, and containing this inscription: "Map and profile "of a part of the Auburn branch of the New York & Oswego Mid-"land railroad, as located in and through a part of the county of "Tompkins, New York." This location covers the 10 miles of railroad above described, from Freeville to the Murdock line at Osmun's.

56 On the 22d of December, 1871, there was filed in the same office a map called "Map No. 2," similarly certified, and containing the same inscription as "Map No. 1." This location is continuous with the preceding, and covers the Murdock line from Osmun's to the north line of the town of Lansing; that being the north line of Tompkins county and the south line of Cayuga county.

On the 23d of December, 1871, there was filed in the office of the clerk of the county of Cayuga a map called "Map 1," sim-
57 ilarly certified, containing this inscription, "Map and profile "of a part of the Auburn branch of the New York & "Oswego Midland railroad as located in and through a part of the county of Cayuga, New York"

This location is continuous with the preceding, and covers the Murdock line from the south line of the town of Genoa (being the north line of the town of Lansing), through the towns of Genoa and Venice, to the south line of the town of Scipio.

On the 30th of May, 1872, there was filed in the last named office a map called "Map No. 2," similarly certified, and con-
58 taining the same inscription as "Map 1." This location is continuous with the preceding, and covers the Murdock line from the south line of Scipio to the Merrifield road in Scipio, which was the north end of the Murdock line, as graded.

On the 29th of August, 1873, there was filed in the last named office a map called "Map 3," similarly certified, containing this inscription: "Map and Profile of a part of the Western Extension "of the New York & Oswego Midland Railroad, as located in and "through a part of the County of Cayuga."

59 This location is continuous with the preceding, and covers a line from the Merrifield road aforesaid to Mud Lock, a point in Cayuga county.

All the maps, taken together, show the location of a continuous line from Freeville northwestward to Mud Lock, a point ten miles northwest of Auburn, and to the eastern line of Seneca county, about fifty miles from Freeville, which county (of Seneca), is next west of Cayuga county. The grading and making of the said rail-
road from Freeville north into and through the town of
60 Lansing, was begun in December, 1871. There was a rail-road already built and running from the village of Cortland to the village of Freeville, west from Cortland, a distance of about ten miles, which belonged to "The Utica, Ithaca and Elmira Railroad Company."

Under a contract or arrangement between that company and the said New York & Oswego Midland Company, the latter began, in the fall of 1872, to run its own cars from Cortland to Freeville, and then on its own road from Freeville to Scipio, 26 miles, its new
road, being the road hereinbefore described as extending
61 from Freeville northward through the town of Lansing to the Merrifield road in Scipio, having been completed. That place in Scipio was eleven miles from Auburn, in a farming community, and never connected with any other railroad until the year 1881, when that road was continued and finished down to Auburn by another company, "The Ithaca, Auburn & Western Company," which is now operating it. Over that part of this line, known previously as the Murdock line, the Midland Company put ties and ballast and rails on the whole length of it, and built some culverts and some bridges.

62 This railroad to Scipio was finished in the autumn of 1872. The said company continued its efforts after that time to extend its said railroad westward, until, embarrassed, by the financial troubles of the year 1873, it failed and discontinued operations, and its property passed into the hands of a Receiver, from which condition the company has never recovered. The Midland Company never located or built any line of road of its own between Freeville and Cortland.

On the 29th of January, 1873, the following proceedings took
place at a meeting of the board of directors of the said
63 Midland Company:

"The President presented the contract made by the Ex-
"ecutive committee with Charles P. Wood, of Auburn, dated Jan-
"uary 1, 1871, for the road bed and franchises known as the Mur-
"dock line. On being read and discussed, J. W. Merchant offered
"the following:

"*Resolved*, That the contract made by D. C. Littlejohn, J. W.
"Merchant, John R. Clark, Cheney Ames and William Foster, as

"the executive committee, and Charles P. Wood, of Au-
64 "burn, for the purchase of the franchises, right of way and
"road bed known as the Murdock line, be, and the same is
"hereby approved, ratified and confirmed.

"*Resolved.* That the action of the President in locating and con-
"structing the western extension of this company's road over and
"upon the said Murdock line, be, and the same hereby is ap
"proved."

"Unanimously adopted."

The persons named were all, or a majority, of the Executive committee.

From Mud Lock to a point westward to Lake Erie or the
65 Niagara River, a distance of 140 miles, there was no location of any route whatever, of or for said western extension, nor was a western terminus on the Niagara River or Lake Erie, ever adopted, determined upon, or in any manner located by said company.

*Seventh.* That consents of tax-payers of said town of Lansing were obtained, said consents consisting of six papers, four of which are dated June 24, 1871, and two June 28, 1871; that said papers are all alike, except that in those dated June 28, 1871, this
66 provision is inserted, which does not appear in the other papers, "And the said commissioners shall hold $25,000 "of said bonds, to be applied upon the line direct to Ithaca."

113 tax-payers signed the consents containing this latter provision. 280 tax payers signed the consents not containing that provision. Neither set of consents taken alone contained the names of a majority of the taxpayers of said town; nor a majority of the taxpayers representing a majority of the taxable property of said town, as appearing on the last preceding assessment-roll of said town.

The line of railroad "direct to Ithaca" mentioned in the
67 consents, was never located or built.

In 1872 an effort was made to bond the city of Auburn in aid of the said N. Y. & Oswego Midland Railroad Company and many signatures of tax-payers obtained but not sufficient to constitute a majority, and the effort failed.

That said six papers of consents are all attached together, and together contain the names of 393 tax payers of said town, with a subscribing witness to each name; that said consents fix upon
68 the sum of $100,000, "to be used in the "construction of the New York & Oswego Midland Railroad and its branches," and authorize and require the commissioners of said town, duly appointed in accordance with the provisions of the act entitled "*An act to facilitate* the construction of the New York & Oswego Midland Railroad, and to authorize towns to subscribe to the capital stock thereof," passed April 5, 1866, and of the several acts amendatory thereof, to carry into effect the purposes of

said acts ; to raise, on the faith and credit of said town, the said sum, to execute bonds therefor, and to do all other acts to
69 carry into effect the purposes of said acts. (Said consents are more particularly set forth hereinbefore in this case.)

*Eighth.* On the 9th day of October, 1871, the then assessors of said town of Lansing, made their affidavit in the words and figures following, and attached the same to said consents of tax-payers, and filed the same in the office of the clerk of Tompkins county and of said town of Lansing.

New York and Oswego Midland Railroad.

"STATE OF NEW YORK, } ss.
*County of Tompkins,* }

"Charles G. Hagin, Egbert Williams and Marvin Bower
70 of the town of Lansing, in said county, severally being duly sworn, doth depose and say, and each for himself says, that he is one of the assessors of the said town of Lansing, in said county, that the within instrument to which this affidavit is annexed, exhibits the consents of the inhabitants of said town to the borrowing of moneys on the credit of said town, and to the issuing of bonds therefor, pursuant to an act of the legislature of the state of New York, entitled "An act to facilitate the construction of the New York and Oswego Midland Railroad, and to authorize
71 towns to subscribe to the capital stock thereof," passed April 5, 1866, and of the several acts amendatory thereof. That a majority of the tax-payers of said town, owning or representing (as agent, president or otherwise, including owners of non resident lands,) more than one-half of the taxable property of said town, appearing upon the assessment rolls of said town, last preceding the date of the acknowledgment and proving of the consents hereto annexed, respectively, have signed the said written consents, that the consent in writing of a majority of the tax-payers of said
72 town, representing in manner aforesaid a majority of the taxable property in said town, according to the assessment rolls aforesaid, has been duly obtained for the purposes aforesaid, pursuant to the acts aforesaid, and that each consent has been duly proved, according to the said acts, and further, deponents saith not.

"CHARLES G. HAGIN,
"EGBERT WILLIAMS,
"MERVIN BOWER.

"Subscribed and sworn to this 9th day of October, 1871, before me.

"J. M. WOODBURY,
"*Justice of the Peace.*"

The said affidavit and said written consents, duly certified
73 and acknowledged, were all fastened together and filed, as required by statute, in Tompkins county clerk's office, and duly recorded therein Oct. 20th. 1871.

*Ninth.* On the 21st of October, 1871, the County Judge of Tompkins county signed a paper, appointing as commissioners of said town, to carry into effect the purposes of said act of 1866, and the acts amendatory thereof, in accordance with the provisions of said acts, the three persons who afterwards executed the said bonds as commissioners, and they took the oath of office as such, on the 1st day of November, 1871.

*Tenth.* The said commissioners issued the bonds in ques-
74 tion, with the coupons annexed, involved in this action, with other bonds, in all, to the amount of $75,000, as follows: On the 31st day of January, 1872, $15,000; and along in the month of August, 1872, the remainder, $60,000, and delivered them to Charles P. Wood, of Auburn, who was assistant treasurer of the said Midland Railroad Company, and was at the same time cashier of the Auburn Savings Bank. The remainder of the $100,000, viz: $25,000, were never issued.

In exchange for said bonds, the commissioners received a cer-
75 tificate or scrip for 750 shares of the capital stock of the said Midland Railroad company, of $100 each, in the name and on behalf of the town of Lansing.

Said bonds and coupons annexed, are all exactly similar in their form and contents, excepting as to their number and amounts, and a correct copy of one of such bonds, and of their endorsements, is set forth in the declaration in this cause. The said bonds state on their face, that they are obligations of said town of Lansing, and that they are issued under the provisions of said act of 1866, and
76 the several acts amendatory thereof and supplementary thereto, especially the said act of 1871.

*Eleventh.* The said commissioners paid all the interest on said bonds, upon presentation and delivery of the respective coupons, which fell due at the expiration of the first six months, (Sept. 1, 1872,) and also paid nearly all that became due at the second and third semi annual payments, (March 1 and Sept. 1, 1873,) having received the money to do so, from the collector and supervisor of the town of Lansing, collected in the usual manner,
77 as provided by said acts; but since that time have not paid any more, nor were any funds provided for such purpose.

The commissioners also received and retained for the town the certificate of 750 shares of the stock of said railroad company.

*Twelfth.* The plaintiff, Purdy, is not a *bona fide* holder for value without notice of the bonds and coupons in suit, nor has he derived

title thereto through any such holder; except that David Howell, deceased, from whose executor plaintiff purchased them, was a purchaser for value, but with notice of any irregularity or defects attaching to or contained in the said written consents and affidavits of assessors annexed to the same.

78 The coupons from bonds on which this action is brought are for semi annual interest, at 7 per cent., and were duly produced, proved and presented by plaintiff, amounting, with interest, to more than $6,000.

The bonds from which they were cut are sixteen in number, each for one thousand dollars, and are numbered from No. 162 to No. 177, both inclusive; and these coupons presented are those due on each of said bonds from March 1st, 1874, semi annually, in March and September, to and including March 1st, 1879,

79 amounting to over $6,000, for which plaintiff asks judgment.

And as CONCLUSIONS OF LAW upon the foregoing facts, the Court held that the cases of Mellen and Thomas, (*Blatchford's* Reports, Vol. 19, p. 572; Vol. 20, p. 278, and Vol. 21, p. 128) were controlling, and decided as follows:

I. No power to issue bonds by the town of Lansing can be deduced from the said acts of the Legislature of New York of

80 1867 or 1869. Because the "Auburn Branch" there authorized was not to pass through the county of Tompkins, or through or near the town of Lansing.

II. Under the act of April 5, 1871, no power is conferred upon any town to issue bonds in aid of the Midland Company, until the whole of the extension is "located" by some definite action by the company.

If the filing of the said maps and profiles were to be regarded as a partial location of the Western Extension from Cortland via Freeville to Mud Lock on the border of Seneca county, there

81 yet remained about 140 miles more of the railroad to be located between Mud Lock and Buffalo or the Niagara River, which, so far as appears, was never located at all.

III. Payment by the commissioners of the first, second and third coupons, and receiving and retaining the stock of the company, may be a ratification of steps in regard to which merely irregularity is claimed, but cannot avail to prevent the town from setting up a total want of power to issue the bonds.

IV. There must be judgment for the defendant, with costs.

To each of the second, third and fourth conclusions of law

82 above stated, the plaintiff's counsel severally and in due form excepted.

JAS. R. COX,
Plaintiff's Attorney.
HURLBUT & UNDERWOOD,
Defendant's Attorneys.

Utica, N. Y., March 18, 1885.

The above stated exceptions of plaintiff to the second, third and fourth rulings of the Court, are hereby settled and allowed.

[L. S.] Signed and sealed this 18th day of March, 1885.
WM. J. WALLACE.

Original filed August 3d, 1885.
W. S. DOOLITTLE, Clerk.

United States Circuit Court, northern district of New York.

WILLIAM A. PURDY, plaintiff,
*vs.*
THE TOWN OF LANSING, defendant.

83 The issues in this action having been brought on for trial at a term of this court, held in and for said district, in the city of Utica, commencing on the 17th day of March, 1885, before the Honorable William J. Wallace, without a jury, a jury having been waived by written stipulation of the parties theretofore duly filed with the clerk of the court, and the said issues then having been tried, and the court having thereafter duly made and filed findings of fact and conclusions of law thereupon, whereby he found and decided that the plaintiff was not entitled to recover
84 herein, and directed judgment in favor of the defendant, The Town of Lansing, against the plaintiff, William A. Purdy, with costs, and the costs and disbursements of the defendant having been duly adjusted and taxed at the sum of $76.65.

Now, on motion of Hurlbut & Underwood, attorneys for the defendant, it is ordered and adjudged that the declaration or complaint of the plaintiff, William A Purdy herein, be and the same is hereby dismissed, and that the defendant, The Town of Lansing, recover of the plaintiff, William A. Purdy, its costs and disbursements of this action, taxed as aforesaid at the sum of $76.65,
85 and that the defendant have execution therefor against said plaintiff.

Judgment signed and entered this 29th day of August, A. D., 1885, at 3 o'clock P. M.

W. S. DOOLITTLE, Clerk.

Circuit Court of the United States for the northern district of New York.

WILLIAM A. PURDY
*vs.*
THE TOWN OF LANSING.

It is stipulated that the return to the writ of error in this case shall consist of copies of summons, complaint, answer, bill of exceptions and judgment, with writ of error, citation and proof of service; and no other papers need be inserted therein by the clerk.

Dated September 7, 1885.

JAS. R. COX,
Attorney for Plaintiff.

HURLBUT & UNDERWOOD,
Attorneys for Defendant.

86 (Endorsed:) Original filed September 11, 1885.
W. S. DOOLITTLE, Clerk.

United States Circuit Court, northern district of New York.

WILLIAM A. PURDY, pl'ff,
*vs.*
THE TOWN OF LANSING, def't. } Bond on writ of error.

Know all men by these presents, that we, Charles E. Parker and J. Lewis Grant, both of Auburn, N. Y., are held and firmly bound to the town of Lansing above described, in the penal sum of five hundred dollars, to be paid to the said The Town of Lansing, its certain attorney, supervisor, or authorized representative;
87 to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

WHEREAS, Lately at a term of the said court, held at the court house in the city of Utica, in said district, in a certain suit or action between the parties above named, the said defendant, The Town of Lansing, recovered judgment for costs against the said plaintiff, and

the same was duly entered and docketed at the clerk's office
88 at Utica aforesaid, on the 29th day of August, 1885, for the sum of seventy-six dollars and sixty-five cents; and the said plaintiff, feeling aggrieved thereby, has obtained a writ of error upon the same, and has procured the usual citations directed to said defendant, and has duly filed the same in the said office, with due proof of the service thereof, with the view and purpose of reversing the said judgment in the Supreme Court of the United States at Washington,

Now, therefore, the condition is such, that if said plaintiff,
89 Purdy, shall duly prosecute the said writ of error with effect, and shall answer and pay all costs and damages which may be adjudged against him in that behalf, if he shall fail to make good his plea aforesaid, then this obligation to be void, else to remain in full force and virtue.

Sealed with our seals, and signed this 3d day of September, A. D., 1885.

[SEAL.] CHARLES E. PARKER,
[SEAL.] J. LEWIS GRANT.

STATE OF NEW YORK, } *ss.*
*Cayuga County,* }

On this 3d day of September, A. D., 1885, before me, a
90 notary public in and for said county, duly commissioned and sworn, appeared the above named Charles E. Parker and J. Lewis Grant, both of Auburn, in said county, to me severally well known, and they and each of them duly acknowledged before me, that they executed the foregoing instrument, for the purpose therein mentioned; and they and each of them being duly sworn, did depose and say, each one for himself, that he is worth the sum of one thousand dollars, over and above all debts and liabilities which he owes or has incurred.

91 [L. S.] JOS. C. ANDERSON,
*Notary Public.*

(Endorsed:) 2097; U. S. Circuit Court, northern district, N. Y.; Purdy vs. Town of Lansing.

Bond on writ of error.
JAS. R. COX, Pl'ff's Att'y.
Approved Sept. 9, 1885; WM. J. WALLACE.
Filed Sept. 11, 1885; W. S. DOOLITTLE, Clerk.

UNITED STATES OF AMERICA.

The President of the United States to the Honorable, the Judge of the Circuit Court of the United States for the northern district of New York, greeting:

Because in the record and proceedings, as also in the
92 rendition of the judgment of a plea, which is in the said court before you, between William A. Purdy, plaintiff, and the Town of Lansing, defendant, a manifest error hath happened, to the damage of said plaintiff, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceed-
93 ings aforesaid, with all things concerning the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct errors, what of right according to the laws of the United States should be done.

Witness Honorable Morrison R. Waite, Chief Justice of the Supreme Court, this 11th day of September, in the year of
94 our Lord eighteen hundred and eighty-five.

[L. S.] W. S. DOOLITTLE,
*Clerk of the Circuit Court of the United States for the northern district of New York.*

Allowed, WM. J. WALLACE.

(Endorsed:) U. S. Circuit Court, northern district, N. Y., 2097; William A. Purdy *vs.* The Town of Lansing; writ of error; Jas. R. Cox, Att'y for pl'ff in error. Due service of within writ is admitted, Utica, Sept. 11, 1885; Francis Kernan, Att'y for def't in error. U. S. Circuit Court, N. D. of N. Y.; filed Sept. 11, 1885; W. S. Doolittle, Clerk.

UNITED STATES OF AMERICA.

95 To the Town of Lansing, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the northern district of New York, wherein William A. Purdy

UNITED STATES SUPREME COURT.

HARRIET A. PURDY, Adm'r'x, &c.,
Plaintiff in Error,
vs.
THE TOWN OF LANSING,
Defendant in Error.

ASSIGNMENT OF ERRORS IN RECORD.

The usual formal assignment of errors having been inadvertently omitted in printing the Record in this case, stipulated that the following may be printed and inserted at page 25 of said Record, as

ASSIGNMENT OF ERROR.

The Circuit Court erred in the "CONCLUSIONS of Law," as stated and set forth at page 20, of this Record; and particularly in the Second, Third, and Fourth of said conclusions and to which exception was duly taken.

UTICA, N. Y., Oct. 31, 1888.

FRANCIS KERNAN,
Att'y for Deft. in Error.

JAMES R. COX,
Att'y for Pl'ff in Error.

is plaintiff, and you, the said Town of Lansing, are defend-
96 ant in error, to show cause. if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 9th day of September, A. D., 1885.

WM. J. WALLACE, *Judge.*

(Endorsed:) 2097, United States Circuit Court, northern district of N. Y; William A. Purdy *vs.* The Town of Lansing.
97 Citation to answer writ of error. Jas. R. Cox, Att'y for pl'ff in error. Due service of the within citation is hereby admitted, and I appear as attorney for said defendant in error. Utica, Sept. 11, 1885, Francis Kernan. U. S. Circuit Court, N. D. of N. Y. Filed Sept. 11, 1885. W. S. Doolittle, Clerk.

UNITED STATES OF AMERICA, } *ss.*
*Northern District of New York,* }

I, William S. Doolittle, clerk of the circuit court of the United States of America, for the northern district of New York, in
98 the second circuit, do hereby certify, that the foregoing pages, numbered from 1 to 49 inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of William A. Purdy against the town of Lansing, as the same remain of record and on file in said office, and as the same has been stipulated and agreed upon by the attorneys for the respective parties.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Utica, in said north-
99 ern district of New York, this 12th day of September, in the year of our Lord one thousand eight hundred and eighty-five, and of the independence of the said United States the one hundred and tenth.

[L S.] W. S. DOOLITTLE, *Clerk.*

United States Circuit Court, northern district of New York.

*Stipulation about Return and Printing.*

WILLIAM A. PURDY, pl'ff, }
*vs.* }
THE TOWN OF LANSING, def't. }

To save unnecessary prolixity and expense, only the first count

and coupon of the declaration may be printed, and then these words:

100 "Here follow 175 other counts, each upon a separate coupon, amounting in all to $6160, besides interest."

Auburn, N. Y., July 29, 1885.

JAS. R. COX,
*Plaintiff's Attorney.*

HURLBUT & UNDERWOOD,
*Defendant's Attorney.*

# United States Supreme Court.

No. 96

HARRIET A. PURDY, Executrix, &c.,

Plaintiff in Error,

vs.

THE TOWN OF LANSING,

Defendant in Error.

## BRIEF FOR PLAINTIFF IN ERROR.

JAMES R. COX,

Of Counsel for Plaintiff in Error.

# Supreme Court of the United States.

No.

HARRIET A. PURDY, Administratrix, &c., Pl'ff in Error,
vs.
THE TOWN OF LANSING, Def't in Error.

Brief & Points for Pl'ff in Error.

This action is upon *Bonds* of this town. Tried by the Circuit Judge without jury. Facts specially found by the Court. (Case pp. 12 to 20.)

Plaintiff, Wm. A. Purdy, died April 29, 1888, and Harriet A. Purdy, his widow, is the Administratrix.

The whole question is of *power to issue bonds;* whether under the Act of April 5, 1871, *the whole extension of* 200 *miles from Cortland to Buffalo, or the Niagara river, must be definitely* LOCATED BEFORE *any town "through or near which said "railroad or its branches may be located"* is authorized to aid its "extension" by bonds: Or whether this aid by bonding of any town *"through or near which it is located,"* may be given as the railroad progresses from town to town; without first *"locating"* the whole 200 miles, or determining the western terminus.

This latter view and understanding was generally received at the time, as the object and purpose of this Act; so as to permit the R. R. Co. to negotiate with those towns which needed the railroad most, and were willing to aid it, to subscribe for stock as the extension progressed, and pay in bonds.

Smith v. Yates, 15 Blatchf. 134.

The Circuit Court in this case holds that *the whole* of this western extension, 200 miles, must first have been *located*, and the western terminus *fixed*, *before* any town "*in any county*" "*through or near which said railroad or branches may be located*," is authorized to aid by bonding. To which plaintiff excepts. (Page 20 of Record.)

And this is the principal assignment for error.

Plaintiff's Bonds are for $16,000, and were originally purchased as an investment, for cash, at par and accrued interest, by one David Howell, deceased. Plaintiff purchased them with these coupons, of the Executor of Howell.

Prior to 1871, the N. Y. & Oswego Midland R. R. Co. had constructed and were running their railroad from Oswego, on Lake Ontario, in a generally south-eastern direction, to the city of New York. From time to time, various branches and extensions at different points, were authorized by statute.—In 1869, such a branch was authorized by statute, (chap. 84 of 1869) from the main track in Chenango or Madison county, through Cortland and Cayuga counties, to the city of Auburn. This being found to be topographically difficult, if not impracticable, was abandoned, and another Act was passed April 5, 1871, (ch, 298,) authorizing the Company "*to extend and construct*" their railroad to any point on Lake Erie or the Niagara river, with the liberty to "*any town*," "*in any* COUNTY, through or near which said railroad or its branches may be located, to bond in aid, without naming any counties. At this time the main line of railroad was connected with Freeville, (in the town of Lansing,) by the Company's branch, Norwich to DeRuyter, and using a part of the Utica Railroad, (under chap. 398 of Laws of 1871, Sec. 4;) and the Company receiving assurances of aid by bonds in the town of Lansing, commenced the construction of this extension in December, 1871, from Freeville in the town of Lansing, and county of Tompkins, northwestward into Cayuga county.

In January, 1872 (Record, p. 19,) $15,000 of these bonds were issued to the Company, and the remainder, $60,000, in the course of that year. The town of Lansing being 800 to 1,000

feet above the Cayuga Lake, the valley of which, sixty miles in length, N, N. W. and S., S. E., and only to be passed beyond its northern extremity, the route from Freeville was compulsory, in a N., N. W. direction, gradually down the long incline of the Cayuga ridge, passing near the city of Auburn.

The Company had constructed this extension through the town of Lansing, and about 20 miles further into Cayuga County, and were pursuing the extension westward, when they failed in the disasters of 1873, and their railroad went into the hands of a Receiver. (Record, fol. 62.)

This extension, existing from Cayuga county, near Auburn, connecting with the main line of the Midland R. R., has been in use ever since December, 1872. (Record, fol. 61.)

The town issued, in all, $75,000 of these bonds; paid interest for two or three years, (Record, p. 19,) and then neglected to provide for it.

The section of the Statute (Chap. 298 of Laws of 1871,) under which this question arises, is found in the special findings of Court. (Record, p. 12.)

The town took and kept the R. R. stock, and paid the first three instalments of interest. (Record, p. 19.)

The year before this Act (of April 5, 1871) in 1870 the Midland R. R. Co. had built and in operation, a branch from Norwich (on their main line) westward to Cortland. (Record, fol. 47.)

The Utica, Ithaca & Elmira Railroad, afforded by contract the present means of running from Cortland ten miles westward to Freeville. (Record, fol. 60.)

This arrangement was authorized by Sec. 4 of the said Act.

The Midland Co. then, in Nov., 1871, *located* their track north-westwardly directly towards Auburn, through the town of Lansing from Freeville; and in Dec., 1871, commenced grading. Three maps and profiles were filed in Dec., 1871, covering the proposed track from Freeville through Lansing into the county of Cayuga; and in 1872, 1873, through Cayuga. (Record, pp. 15, 16.)

These bonds were afterward sold at the Auburn Savings bank at par, to various investors while the town paid the interest, who subsequently sold them to Plaintiff.

## POINTS FOR PLAINTIFF.

I. That the statutes under which these bonds were issued, are sufficiently comprehensive, and were intended to authorize their issue to aid and facilitate the *gradual extension* of this railroad, is entirely clear and plain.

They are as follows:

### STATUTES OF NEW YORK:

*A.* The ORIGINAL Act (chap. 398,) of April 5, 1866, authorizing bonds of the towns and villages in the several (eleven) counties of N. Y., through which the N. Y. & Oswego Midland Railroad, was projected, is as follows:

"An Act to facilitate the construction of the New "York & Oswego Midland Railroad, and to authorize "towns to subscribe to the capital stock thereof."

Sec. 1. Names the counties of Oswego, Onondaga and nine others—and that upon the proper application of freeholders to the County Judge, he may appoint Railroad Commissioners to carry into effect the purposes of this Act.

Sec. 2. Such Commissioners are authorized to borrow money in the name of their town, city or village, to the amount indicated by assents of taxables, and to issue town bonds. * * * * * "And the facts, that a majority of the said tax pay- "ers, representing a majority of the taxable property, "has been obtained and acknowledged or proved, "*shall be proved* by the affidavit in writing of one of "the assessors of the town or city, * * * and "shall be endorsed upon or annexed to said written

"consents, and the said consents and affidavit shall "be filed in the Town Clerk's office of the town; * * "and the same, or a certified copy thereof, shall be "evidence of the facts therein contained, and shall "be admitted in evidence in any Court of this State."

Section 5 to 14, irrelevant to any question arising in this case.

Sec. 15. Said Railroad Co., authorized to build branches in the counties of Orange and Sullivan.

Secs. 16 to 25, irrelevant.

Act of April 20, 1866, (chap. 695.)

Sec. 1. The original consents, acknowledgments or proofs, of tax payers to loaning of money, or issuing of town bonds for railroads, shall be filed and recorded in the County Clerk's office of the county; and a certified copy thereof to be filed in each *Town Clerk's* office, where property affected by it is situated.

Act of May 5, 1867, (ch. 917) entitled, "An act "to facilitate the construction of the New York & "Oswego Midland Railroad Co.," &c., &c.

Secs. 1 to 6, irrelevant.

Sec. 7. "The Commissioners of any town or city "may issue their bonds directly to the directors of "said New York & Oswego Midland Railroad Co., "at not less than their par value, and receive in ex- "change therefor, the stock of said Company at not "more than par."

Secs. 8, 9, 10, irrelevant.

Act of April 28, 1870, (ch 507.)

"An Act to define the powers of Commissioners," &c.

Sec. 1. Competent for R. R. corporations "to enter "into any agreement with Commissioners appointed "to issue bonds," &c.,—defining the *times* and *pro-*

*portions* of bonds to be delivered to the corporations, and *place* or *places* where, and *purposes for which* such bonds to be applied or used. Commissioners not to be bound to deliver until such agreements be executed by the corporation.

Act of April 5, (ch. 298,) 1871.

*B.* Entitled "An Act to authorize the New "York & Oswego Midland Railroad Company *to ex-* "*tend* its road, and to facilitate the construction "thereof."

Sec. 1. "The New York & Oswego Midland Rail- "road Company are hereby authorized TO EXTEND "AND CONSTRUCT their railroad from the city of "Auburn, or from any point on said road, easterly "or southerly from said city, upon such route and "location, and through such counties as the Board "of directors of said Company shall deem most "feasible and favorable for the construction of said "railroad, to any point on Lake Erie or the Niagara "River."

(Here follows authority to construct other branches:)

"AND ANY TOWN, VILLAGE OR CITY, IN ANY "COUNTY THROUGH OR NEAR WHICH said railroad "or its branches *may be located*, (except counties ex- "empted from the general bonding laws,)—may aid "or facilitate the construction of the said railroad "and its branches and extensions, by the issue and "sale of its bonds, in the manner provided for in "the Act entitled 'An Act to facilitate, &c., (chap. "398,) April 5, 1866, and the acts amendatory and "supplementary thereto.'"

(Obviously this language did not require *the whole* of the branch to be located in the county. When we say that a Railroad is located through or near

the county of Tompkins, or the county of Cayuga we are not understood to say that the *whole* of the Railroad is in that county.)

Sec. 2. Extends time for assets of tax payers to Dec. 31, 1875.

Sec. 3. Granting wharf facilities to Company at Oswego.

Sec. 4. (After confirming agreement made with another company,) — "and the said New York & "Oswego Midland Railroad Company is hereby "authorized and empowered *to lease or operate any* "*road* or roads in the State of New York or New "Jersey, *with which it may connect* or which shall "*form a portion of its line*, on such terms, &c., as "mutually agreed upon."

Sec. 5. Takes effect immediately.

*C.* Much light is thrown upon this question by considering the state of things then existing (in April, 1871,) under the GENERAL STATUTES authorizing the formation of Railroad companies, &c.

By those Acts (of April 5, 1850, as variously amended), the company must file their certificate, showing among other things,

1. Number of years to continue.

2. The *termini* of the road.

3. Its length, and the name of *each county* through which it is to pass.

This Midland Company, if undertaking to extend their road to Buffalo or the Niagara River under *this* statute, would have been obliged to designate the *termini* and the *different counties.*

But that was what they desired to avoid; they wished to have the privilege of bargaining with the towns and of laying their extension through such

towns and counties as needed the railroad facilities the most, and would aid the road by bonds; hence this Act of April 5, 1871, to confer that privilege, under which these bonds were issued.

The GENERAL railroad bonding Act (ch 925,) of May 12, 1871, in respect to *conditions* stated in the petition, has this language:

Sec. 1. * * * "The petition may be absolute "or *conditional*, and if the same be conditional, the "acceptance of a subscription founded on such pe- "tition, shall bind the railroad company to the "observance of conditions, — provided, however, "that non-compliance with any condition of such "petition, *shall not in any manner invalidate the* "*bonds.*"

*D.* Now, whether the statute pre-requisites had all been complied with, could only be known to the Railroad Commissioners who issued these bonds; *ex necessitate rei*, they were charged with the duty of deciding; and their issuing these bonds was, to the purchaser, the strongest possible affirmation of compliance with all the statute requirements.

And the purchaser had the right to rely upon it.

Co. Commissioners v. Chandler, 96 U. S., 205.
San Antonio v. Mehaffy, Ib. 314.
4 Otto, 427.
Supervisors v. Schenck, 5 Wall, 772.
San Antonio v. Lane, 32 Tex., 405.
Henry v. Nicholas, 95 U. S., 619.

And the town is not to be at liberty to deny it, as against a good faith purchaser.

Grand Chute v. Winegar, 15 Wall, 355.
Knox Co. v. Aspinwall, 21 How., 539.

Mercer Co. v. Hackett, 1 Wall, 83.
Venice v. Murdock, 92 U. S., 494.
Mayer v. Lord, 9 Wall, 414.
Merchant Bk. v. State Bk., 10 Ib., 644.

This is not a case of *ultra vires, because fairly within the scope* and powers of the agents — the R. R. Commissioners.

*Vide* distinctions pointed out by Comstock, J., 22 N. Y., 269, 289, and in 16 N. Y., 129, 130.

Whether or no, in fact, there were irregularities in the practice preceding the issue of the bonds; whether or no any of the *conditions precedent of fact* were complied with, he was not bound to enquire.

Knox Co., 21 How., 539.
Marcy v. Oswego, 92 U. S., 642.

The language of the bonds (Record, p. 18,) proclaims their issue — "*under the provisions*" of the Acts of April 4, 1866, and *especially* that of April 5, 1871.

And the endorsement (p. 19,) assures us of the consent, in writing, of the majority of persons and property.

All this represents compliance with all precedent conditions and preliminary requirements of the statutes.

Oregon v. Jennings, 119 U. S., 75.
Robert v. Bolles, 101 U. S., 119.
Supervisors v. Galbraith, 99 Ib., 214.
Wilson v. Salamanca, Ib. 499.
Warren v. Marcy, 97 Ib., 96.
Marcy v. Oswego, 92 Ib., 637.
Hackett v. Ottawa, 99 Ib., 86.
Coloma v. Eaves, 92 Ib., 484.
Dixon v. Field, 111 U. S., 95.

*E.* If the previous *location* of the railroad "*through or near*" the town of Lansing, is *to be regarded as one of these conditions precedent*, the purchaser had the *right to presume that it was done.*

Marcy v. Oswego, 92 U. S., 637.
Commissioners v. Clark, 94 U. S., 287.

1st. Because here were the bonds on sale, and he had doubtless heard that the railroad was actually in process of construction, as was the fact.

2d. Clearly, the railroad was in process of *location, extension and construction.* (Record, p. 16.)

3d. Because the bonds recite and affirm that "they are *issued under the provisions of the Act of* "*April* 5, 1866, and the amendatory Acts, and espe- "cially under the Act of April 5, 1871." (Record, p. 19, fol. 76.)

4th. "Where a corporation has *power* under any "circumstances," etc.

5th. Even the Commissioners had no authority nor duty to overhaul the affidavit of the Assessors, to see if their computation was correct; and why should the proposing purchaser of the bonds be charged with any knowledge of errors of Assessors, their affidavit being full and correct.

Ontario v. Hill, 99 N. Y., 329.
Knox v. Aspinwall, 67 U. S., 210.
Bissell v. Jefferson, 24 How., 299.
Moran v. Miami, 67 U. S., 344.
Gelpke v. Debuque, 1 Wallace, 203.
Lynde v. Winnebago, 16 Wall, 6.
Kennicott v. Wayne, Ib. 452.

II. The "*locating*" of this branch railroad through or near this town *and also* 140 *miles beyond it to Buffalo*, was not, by the Act of April 5, 1871, intended to be a *condition precedent* to subscribing for the stock, or issuing the bonds.

*A.* 1st. Because the statute does not declare what "*locating*" is, or how it shall be evidenced. The good sense of the Commissioners would evidently take care of that.

2d. Because by the act of 1870, (supra) the R. R. Commissioners are invested with the discretion of *bargaining* with the R. R. Co., and doling out the bonds to the R. R. Co., as they are satisfied with the progress of the work.

3d. The language of the Act does not import any such *condition precedent.* The words are, "*Any town*, "*village* or city in any county through or near which "said road or its branches *may be located*," may subscribe for stock, etc.

*B.* The language of the statute being "to EXTEND and construct," reasonably imports that the railroad is gradually to be located and built, from town to town.

"EXTEND; to stretch out, to spread abroad, to "enlarge." — WALKER'S Dictionary.

"To spread out, to stretch out, amplify (opposed "to contract), to diffuse, expand, enlarge." — WORCESTER.

"To stretch out in any direction, to carry forward, "continue in length, as a line; to expand or dilate "in size; to reach forth, enlarge, prolong." — WEBSTER.

*C.* The conclusion of the Circuit Judge, (Record, p. 20,) requiring the "*whole extension*" to be first located, *before* towns could aid; and predicating important consequences, of the mere *name* put upon the engineers' maps, as "*The Auburn Branch*," or the "*Western Extension*," (Record, p. 15,) seems to lose sight of the force of the word "*extend*" in the statute.

As to the construction of such statutes and the intention of the Legislature —

See James v. Milwaukee, 16 Wall, 160.

As to contemporaneous construction —

"The intention of the Legislature is to be sought "for. *That*, whatever it may be, constitutes the "law."

See Phelps v. Lewiston, 15 Blatchf., 92, and
Smith v. Yates, Ib. Blatchf., 148.
Callaway v. Foster, 93 U. S., 574.

Showing the object of the law was to enable the R. R. Co. to *make choice* of routes, in regard to aid by bonds, as the work progressed.

The supposed CONDITION is to be found *lurking* in the words "*may be located*," (*not may have been located*); and to hold such an expression a *condition precedent*, especially when, as we shall see, such construction is not accompanied *by any analogies* or corroboration, *cannot be law.*

Because a *condition* precedent must be always plain and explicit, and is not to be extracted from vague and doubtful words.

8 Coke, 90.
Shep. Touchst, 134.

As held in Clinton v. Hope Ins. Co., 45 N. Y., 464, "The party to a contract who seeks to destroy "its obligation by reason of an alleged breach of "*condition precedent*, cannot establish the existence "of such condition by inference or conjecture; the "terms of such contract must be clear or explicit."

Woods v. Lawrence Co., 1 Black., 386, was where the Charter authorized the counties "*through which* "*the Railroad may pass*," to subscribe for stock and issue bonds; it was held that they may subscribe, &c., without waiting till the route should be actually located.

See Addison on Contracts, p. 136.

Parsons on Contracts, p. 526.

"A condition of this sort *is not favored*, and would not be readily implied."

See in 1st Story Contracts, Sec's 40-50.

The inability of the Circuit Judge to discover that what the engineers called "*Auburn Branch*" was only another name for the "*Western Extension*," (as there were several "*Branches*" to this Midland Road, the Newburgh Branch, and the Ellenville Branch, Ch. 398, Laws of 1866, Sec. 15; the Delhi Branch, Ch. 917, Laws of 1867, Sec 3, Record, pp. 29, 30); and his interpretation of the Act of April 5, 1871, (under which this effort was made to "*ex-* "*tend and construct*" the branch northwestwardly,) as requiring "*the whole*" *extension* or branch to be located, before the "bonds of any town can be issued," (Record, p. 20,) seems to be a harsh construction against *bona fide* holders of bonds not only, but hardly warranted by the rules of construction, and the law as held and enforced by this Court for twenty years past.

The Company expected to go to Auburn, and so on westward; but Auburn refused to aid by bonds, and the road was then located four miles west of it.

(The mistake of the Circuit Judge probably arose from keeping in his mind the two Acts of 1867 and 1869, which offered to the R. R. Company the authority to go to *Auburn* through *Onondaga* county; but the Company never availed themselves of this authority; and afterwards, the Act of April 5, 1871, authorized the Western Extension, which the Company undertook to build. Those two Acts of 1867 and 1869 have no place in this case and are not factors in the argument.)

*D.* Of all the bonding statutes of the State of New York, from 1865 to 1875, NO SINGLE ACT CAN BE FOUND which even implies that the *locating* of the railroad must precede the issue of town bonds in aid of it.

Instance:

The general bonding Act, Ch. 907 of Acts of 1869, and the several amending Acts.

General Bonding Act of 1869.

Sec. 1. "Whenever a majority of the tax payers "of any municipal corporation in this state * * * "representing a majority of the taxable property, "apply to a County Judge, by a petition, setting "forth, &c., * * * * such a railroad company "in this state as may be named in the petition," &c.

Sec. 5. The Commissioners directed "to subscribe "in the name of the municipal corporation, to the "stock or bonds of the railroad company named in "such petition, &c., &c., * * and pay for the "same by exchanging the said (town) bonds there-"for at par," &c., &c.

All this, at any stage of the railroad company's existence, without any restrictions as to *location* of

road or stage of construction, projection or contemplation. The law left that business wholly in the discretion of the Commissioners.

Laws of 1866, Chap. 625, Black River R. R., Chap's 426, 645, 894, 763, 398, 845, 546, 626, 648, 433, 50, 364, 624.

And this is true, not only of the general bonding Act, but also of every *special* bonding Act, passed by the Legislature down to 1875, to the changes in the constitution forbidding *all bonding* for railroads.

*E.* There are varied forms of expression in the many different Town Bonding Acts, contemplating proposed routes of projected railroads; but they probably all mean the same thing, viz: —

"*Along the route,*" 101 U. S., 196. 119 U. S., 695.

"*Situated along the route,*" 15 Blatchf., 134.

"Any part of the route of said railroad *may be,*" 93 U. S., 567.

"*Through which the railroad may pass,*" 1 Black., 386.

And in Callaway v. Foster, 93 U. S., 574, this sort of expression is considered, and the obvious intention of the Legislature explained and enforced.

The case is in point; the opinion by Mr. Justice Hunt of New York, who was entirely familiar with our system, as to this intention, holds,

"This was the intention of the Legislature; for "the double purpose, no doubt, of enabling the "Company to select the best route, and of stimu- "lating rivalry among the different localities, which "might wish to obtain the benefit of the location."

No precise route was laid out in that case by the Act; the liberty to select was given to the Company.

See 93 U. S., p. 574, for Section 35 of that Statute.

In U. S. v. Collier, 3 Blatchf., 325, the well known principle is stated.

"In the construction of a statute, the Court will "look out of it to other statutes *in pari materia*, or "of a similar import, although of independent "enactments regarded as one system, to be aided "(in construction,) by other provisions composing "the system."

So in Dwarris on Statutes, 189.

"An established rule of law, that all acts *in pari* "*materia* are to be taken together, as if they were "one law, * * * considered as framed upon "one system, and having one object in view."

Rochester Water, 66 N. Y., 413.
Rogers v. Bradshaw, 20 John., 744.
Mc Carty v. Orphan Asylum, 9 Cow., 507.
Rexford v. Knight, 15 Barb., 642.

1 Kent's Comm., 433, citing Ailesbury v. Patterson, 5 Dougl., 27.

KENT says: — "And it is to be inferred that a "code of statutes relating to one subject was gov- "erned by one spirit and policy; and was intended "to be consistent and harmonious in its several parts "and provisions."

Why, then, should we look for such a condition precedent in the vague expression "*may be located*," and why should we read it — "may *have been* located?"

See Callaway v. Foster, 93 U. S., 57, 573-4.
Smith v. Yates, 15 Blatchf., 134, 148.

And the New York Court of Appeals has always held (as in Goillotel v. Mayor, 87 N. Y., 446,) that "a harsh and unreasonable inference of legislative

"intention is not to be drawn where the language "of the Act fairly and naturally admits of one, not "only more just and wise, but in better harmony "with an *intention already expressed and a general* "*system intended to be consistent and uniform.*"

In Callaway v. Foster, 93 U. S., 573-4, where the statute reads — "It shall be lawful for any county in which ANY PART 'OF THE ROUTE MAY BE,' to subscribe for stock, issue bonds," &c.— This Court holds that this expression "*may be*," is incomplete, and must be construed in reference to the situation of the subject matter.

In that case, the railroad was only projected, not "*located*," and this Court saw no reason to favor the defendant's construction, that the railroad must have been *in actual being* before bonds could be lawfully issued to aid its construction. (The dissent of several members of the Court, was upon the necessity of a vote of the electors.)

*F.* So in Smith v. Yates, 15 Blatchf. 134, 148, a reasonable construction was given to a similar statute.

In Kirkbride v. Lafayette, 108 U. S., 208, "the "construction put upon the statute at the time the "bonds were voted and issued, by those interested "in executing "its provisions," was clearly recog- "nized by this Court.

So also in Green v. Conness, 109 U. S., 105.
Douglas v. Pike Co., 101 Id., 687.

The General Term of Supreme Court of New York, (3d Dep't,) had held in 1871, in Hoag v. Peck, 4 Lansing Rep'ts, 531, that there was nothing in the statutes requiring that the railroad should be *actually located* at the time of issuing bonds.

(Showing, also, all that is required.)

5th. Because by the Act of 1870, Ch. 507, the issue of the bonds, when and how, and to be applied so and so, *is left to the discretion of the Commissioners*, and they are authorized to bargain with the R. R. Co. on the subject.

(In point) Coloma v. Eaves, 92 U. S., 490-1.

*G.* As to the latent "*condition precedent*," now first discovered, the remarks of this Court in a recent case, 114 U. S., 126, citing and approving the doctrine of State v. Stoll, 17 Wall, 436, appear to be applicable: —

"If the Legislature intended to do what is claimed, "it was bound to do it openly, intelligibly, and in "language not to be misunderstood; and as a doubt-"ful or obscure declaration would not be justifiable, "so it is not to be imputed."

Again: In Moran v. Miami, 67 U. S., 725, this Court holds the following:

"In case a sentence (in a statute) is capable of "having two meanings, a construction must be given "favorable to the public. In applying these prin-"ciples of construction, it must be done *with reference* "*to the subject matter contemplated by the Legislature* "*as a whole*, so as not to allow its manifest purpose "and design to be defeated, by denying the use of "means by which the main object could only be "accomplished."

Why, then, should the intention to create a "*condition precedent*" be imputed here?

And if imputed, so far as location "*through or near the town*" is concerned, why go one hundred and forty miles farther, and impute such intention *as to the entire route* to Buffalo or Niagara?

The proof of *location* through *the town* is clear enough. (Record, pp. 15, &c.)

*H.* All this being seen, *why* should we read a *condition precedent* lurking under such a doubtful and incidental phrase, "*may be located,*" requiring location of the whole road?

And this against a *bona fide* purchaser?

It is true that the Court of Appeals of New York, in 1874, (People ex. rel. Morgan v. Aiken, 55 N. Y., 588,) held *location* of the railroad *in or near the town, a jurisdictional* question (p. 591).

This was the *very first* announcement, and it was *two years after* our bonds had been purchased.

(But apart from remarking that there *was no reason* for the *Assessors* in making Return on *Certiorari,* to say anything about the condition or location of the Road, we find no fault with that decision: those in charge of those proceedings neglected to *prove the fact* of actual location in Cayuga County and in that town, at that time: which fact abundantly appears in *this case.*)

The General Term of Supreme Court had held the contrary, 65 Barb., 473. Also Thompson and Cook, Supreme Ct. Reports, Vol. 1, p. 101.

But this ruling of the Court of Appeals was on *certiorari,* where no bonds had been issued, and a defect in the evidence; it seems that in that case no evidence was presented showing the *location* of this railroad into Cayuga county, although, as this case shows, (Record, p. 15,) *it was in fact located* through the three towns in Cayuga, *i. e.*, Genoa, Venice, Scipio, in 1871; and not as in this case of *a bona fide* holder, where the railroad had been located and built; and we answer it in the language of this Court, (as given in Pine Grove v. Talcott 19 Wall, 666,)

"The question belongs to the domain of general "jurisprudence. We are not bound by judgments

"of local courts. Here, commercial securities are "involved; *when they* were issued, there was no "authoritative intimation against the acts."

Burgess v. Seligma, 107 U. S., 20.
So in Swift v. Tyson, 16 Peters, 18.

As to *newly discovered construction* of statutes.

See Mercer Co. v. Hackett, 1 Wall, 94.
Same doctrine in Block v. Com'rs, 99 U. S., 699.
Venice v. Murdock, 92 U. S., 497.
Thompson v. Perrine, 103 Ib., 806.

Compared with Horton v. Thompson, 71 N. Y., Reports 513.

Because by this decision, the Plaintiff's bonds, of over $16,000 are held void, by reason of imputed lack of power to issue them, when the Legislature evidently *intended* by these Acts to confer the power; because the parties concerned so understood it, and acted upon it; because respectable judicial tribunals so understood and held; and because it requires a perversion of the language and intent of the statutes to impute a condition precedent a latent "*snare and delusion*" in their language;—we ask for a reversal of this judgment.

JAS. R. COX,
Plaintiff's Att'y.

Auburn, N. Y., Sept. 1888.

Supreme Court of U.S.
FILED
NOV 13 1896
JAMES H. McKENNEY,
CLERK

# UNITED STATES SUPREME COURT.

No. ~~865~~. 96

WILLIAM A. PURDY,
*Plaintiff in Error,*

vs.

THE TOWN OF LANSING,
*Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR.

FRANCIS KERNAN,
H. V. HOWLAND,
*Counsel for Defendant in Error.*

L. C. CHILDS & SON, LAW PRINTERS, 33-35 CHARLOTTE ST., UTICA, N. Y.

# United States Supreme Court.

## *No. 365.*

WILLIAM A. PURDY, PLAINTIFF IN ERROR,

VS.

THE TOWN OF LANSING, DEFENDANT IN ERROR.

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Writ of error by Purdy, who was the plaintiff in the Court below, to review a judgment entered in the Circuit Court of the United States for the Northern District of New York, in favor of the Town of Lansing, on the findings of fact and rulings of law made by Circuit Judge Wallace on the trial of the case before him without a jury, in March, 1885, (*fols.* 39 *and* 40.)

The suit was commenced in said Circuit Court in 1879, by the service of a summons declaration, (*fols.* 1 *to* 4.)

The declaration is at *folios* 4 *to* 18, the answer at *folios* 18 *to* 39.

The action was brought to recover interest to the amount of over $6,000, due on certain bonds and coupons alleged to have been made on behalf of the Town of Lansing, one of the towns in the county of Tompkins, in the State of New York.

The findings of fact by the Circuit Judge are at *folios* 40 *to* 79. His conclusions of law and order for judgment in favor of the defendant with costs, are at *folios* 79 *to* 82.

The counsel for the defendant excepted to the II, III and IV conclusions of law, (81½ *and* 82.)

The judgment of the Court below is at *folios* 83 *to* 85.

In or about January, 1866, the New York and Oswego Midland Railroad Company was organized under the general statute of New York for the incorporation of railroad companies, to construct and operate a railroad from the city of Oswego, in said State, to the State line of New Jersey; thence to a point on the Hudson river opposite the city of New York, (*Declaration, fol.* 5; *Answer, fols.* 20, 21; *Third Finding of Fact, fol.* 46.)

Prior to 1869, the said Midland Railroad Company located its main line from the city of Oswego, in a southeasterly direction, to a point on the western shore of the Hudson river opposite the city of New York; and its road was constructed and operated on this line. This main line was located and runs about thirty-five miles to the east of the east line of Tompkins county, (*Finding, fols.* 46 *and* 47.)

On the 5th of April, 1866, the Legislature of the State of New York, enacted a law known as Chapter 398 of the laws of that year. It is entitled "An act to facilitate the "construction of the New York and Oswego Midland Rail- "road, and to authorize towns to subscribe to the capital "stock thereof," (*See Laws of New York for* 1866, *Vol* 1, *p.* 874; *Finding, fol.* 44.)

By this law of 1866, "any *town* or *city* in either of the "counties of Orange, Sullivan, Ulster, Delaware, Otsego, "Chenango, Cortland, Madison, Onondaga, Oneida or "Oswego" might, by the proceedings and on the conditions therein mentioned, have commissioners appointed to subscribe for stock of the railroad corporation and issue bonds on behalf of the town to pay for the same, (*see Sections* 1, 2 *and* 3 *of said act of* 1866 *above cited.*)

In May, 1867, the Legislature of New York enacted a law known as Chapter 917 of the Laws of 1867, (*see Vol.* 2 *of the Laws of* 1867, *p.* 2290.) By section 3 of this act, as amended by section 4 of Chapter 84, of the Laws of New York for 1869, (*see same, Vol.* 2 *of Laws of* 1869, *pp* 142, 143,) it was enacted that "The Board of Directors of said New "York and Oswego Midland Railroad Company are hereby "authorized to construct a *branch* railroad from the line of

"the said road at *any point* in the *counties of Chenango* or "*Madison, through* the counties of *Chenango, Madison, Onon-*"*daga, Cortland, Cayuga,* to the city of Auburn in the "county of Cayuga, whenever in the judgment of the "directors the same shall be for the interest of said corpo-"ration; * * and the *towns, cities and villages* along the "line of the said *branch railroads* or *interested* in the con-"struction thereof, *in any county through which said railroad* "*shall run,* shall have the same right, authority and power "to subscribe stock and make and issue bonds to aid in the "construction thereof, as is given by this act and by Chap-"ter 398 of the Laws of 1866," (*Finding, fol.* 45.) The branch railroad mentioned in the above referred to statutes of 1867 and 1869, is referred to in the record as the Auburn Branch; and it was not intended to be and was not authorized to be constructed, or run into or through the county of Tompkins at all; but only through the counties specified in said acts.

In 1870 the said Midland Company had constructed and built a branch of its road from Norwich, on its main line, in the county of Chenango, to the village of Cortland, in the county of Cortland, which is south and east of Auburn, and was running its cars thereon in 1871. The part of this said branch between Norwich and De Ruyter was built under the above referred to act of 1867, as amended by the act of 1869, above referred to, and was built with the intention of constructing the branch to Auburn and not through Tompkins county at all, (*Finding, folio* 47.)

On the 5th of April, 1871, the Legislature of New York passed an act known as Chapter 298 of the laws of 1871. It is found in *Vol.* 1, *page* 586 of the laws of that year. This act is entitled "An act to authorize the New York and "Oswego Midland Railroad Company to *extend its road,* and "to facilitate the construction thereof."

By section 1 of this act it is provided as follows: "The "New York and Oswego Midland Railroad Company are "hereby authorized and empowered to *extend* and construct "their railroad from the city of Auburn, or *from any point*

"*on said road, easterly or southerly* from said city upon such "*route and location and through such counties as the Board of* "*Directors of said Company shall deem most feasible and* "*favorable* for the construction of said railroad, *to any point* "*on Lake Erie or the Niagara river.*" * * (Then follows provisions authorizing the said Company to construct certain branches and extensions easterly of Cortland county named.) Then follows this provision: "And any town, "village or city in any county through or near which said "*railroad* or its branches *may be located,* except such coun- "ties, towns or cities as are excepted from the provisions of the general bonding law, may aid or facilitate the con- "struction of the said New York and Oswego Midland rail- "road and its branches and extensions by the issue and sale "of its bonds *in the manner provided for in the act* entitled "'An act to facilitate the construction of the New York "'and Oswego Midland railroad and to authorize towns to "'subscribe to the capital stock thereof,' passed April 5th, "1866, and the acts amendatory of and supplementary "thereto," (*Finding, fols.* 42 *to* 44.)

On the 16th of November, 1871, the Board of Directors of the said Midland Company adopted the preamble and resolutions set out at *folios* 48 *to* 52. By the first of these resolutions the Board of Directors state that they "deter- "mine that the construction and *extension* of said railroad "(mentioned in the act of 1871 above referred to) westerly, "commence at and from the village of Cortland, in the "county of Cortland, and thence to *Lake Erie or the* "*Niagara river,*" (*Finding,* 50.)

In or about 1852, a road bed sixteen miles long, called the "Murdock" line, intended for a railroad, had been graded. This line extended from a place called "Osmuns" in the town of Lansing, northward to the north line of this town, which is the south line of Cayuga county and of the town of Genoa in that county, and thence northward through said town of Genoa and the town of Venice and into the town of Scipio, all in Cayuga county, (*Finding, fol.* 52. In 1871 this "Murdock" road-bed had become grassed over and the culverts were decayed, (*Finding, fol.* 53.)

On the 1st of January, 1871, the Executive Committee of said Midland Railroad Company purchased for said Company said "Murdock" line, (*Finding*, 53 )

During the summer and fall of 1871 the said Midland Company made two surveys for lines of railroads—one from East Homer in the county of Cortland, and one from Truxton, in the same county, both in a northwestern direction and both to the north and east of Tompkins county, (*Finding, fol.* 53.)

The said Midland Company also during 1871, made a survey for a line of railroad to run from Freeville, in the town of Dryden, Tompkins county, through a part of the town of Lansing to the south end of said "Murdock" line at Osmuns in said town of Lansing, a distance of ten miles, (*Finding, fol.* 54.)

The general law of New York, authorizing the incorporation of railroad corporations, directs the manner in which the company shall *locate* its road, viz: by surveying "the "line or route of its proposed road and making a map of "the survey thereof by which such route or line is desig- "nated and that they have *located* their said road according "to such survey, and filed *certificates* of such *location*, signed "by a majority of the directors of the company, in the "Clerk's office of the several counties through or into "which the said road is to be constructed," (2 *Revised Statutes of New York, 6th Edition, p.* 523, *sec.* 15.)

On the 13th of December, 1871, there was filed in the office of the Clerk of the county of Tompkins, a map called "Map No. 1," *certified* by the directors of said Midland Company as required by law, and containing this inscription, "Map and profile *of a part of the Auburn Branch* of the New "York and Oswego Midland Railroad *as located* in and "through a part of the county of Tompkins, New York." This location covers the line of ten miles above mentioned, extending from Freeville to the south end of the "Murdock" line, (*Finding, fol.* 55.)

On the 22d of December, 1871, there was filed in the same Clerk's office, a map called No. 2, similarly certified

and containing the same inscription as Map No. 1. The location by this Map No. 2 is continuous with the location by No. 1, and covers the "Murdock" line from Osmuns to the north line of the county of Tompkins and the south line of Cayuga county, (*Finding, fol.* 56.)

On the 23d of December, 1871, there was filed in the Clerk's office of Cayuga county, a map called No. 1, similarly certified by the directors of the Midland Company and containing this inscription, viz: "Map and profile of a part "of the *Auburn Branch* of the New York and Oswego Mid- "land Railroad Company as *located* in and through a part of "the county of Cayuga, New York." This location is continuous with the preceding and covers the "Murdock" line from the south line of the town of Genoa and Cayuga county, through the towns of Genoa and Venice, to the south line of the town of Scipio in Cayuga county, (*Finding, fol.* 57.)

On the 30th of May, 1872, there was filed in the Clerk's office of Cayuga county, a map called No. 2, similarly certified by the directors of the said Midland Company and containing the *same inscription* as above mentioned on Map 1 filed in Cayuga county. This location is continuous with the preceding and covers the "Murdock" line from the south line of Scipio to the "Merrifield" road in said town of Scipio, which was the north end of the "Murdock" line as graded, and which point is about eleven miles from Auburn, (*Finding, fols.* 58 *and* 61.)

It will be observed that neither of the above mentioned surveys, maps and profiles purported to or were locations of the *western extension* of the railroad of the Midland Company or any part of it, to or towards Lake Erie or the Niagara river; but purported to be and were, if of any effect, the location of a part of the *Auburn Branch* of the Midland railroad, hereinbefore mentioned.

The construction of a railroad from Freeville aforesaid north to the "Merrifield" road in the town of Scipio in the county of Cayuga, was commenced in December, 1871, and completed in the autumn of 1872, (*fols.* 60, 62.) This

piece of railroad from Freeville to the "Merrifield" road in Scipio, was twenty-six miles in length, and terminated eleven miles from Auburn in a farming community; and was never connected with any other railroad until 1881, when this piece of railroad was continued and finished to Auburn by another company known as the Ithaca, Auburn and Western Company, (*fol.* 61.)

Freeville was west from the village of Cortland a distance of ten miles; and prior to and in 1871 there was a railroad constructed, owned and operated by a corporation known as the Utica, Ithaca and Elmira Railroad Company, and the railroad of this Company ran through Freeville. By an arrangement between this Utica, &c., Company and the Midland Company, the latter Company began, in the fall of 1872, to run its own cars from the village of Cortland, on the road of the former Company, to Freeville, and thence on its own railroad to its terminus at the "Merrifield" road in Scipio. This was done till some time in 1873, (*fols.* 60, 61, 62.) The Midland Company never located or constructed any railroad of its own between Cortland village and Freeville, (62½.)

On the 29th of August, 1873, there was filed in the Clerk's office of Cayuga county, a map called Map 3, similarly certified by the directors of the Midland Company as those above mentioned, and containing this inscription, viz: "Map and profile of a part of the *western extension* of "the New York and Oswego Midland railroad as located in "and through a part of the county of Cayuga." This location covers a line from the "Merrifield" road or north end of the "Murdock" line above mentioned, to Mud Lock, a point in Cayuga county, (*Finding, fols.* 58 *and* 59.)

Mud Lock is ten miles from Auburn, (59.) From Mud Lock to the Niagara river or Lake Erie is one hundred and forty miles; and there was no location of any route whatever of or for said western extension between Mud Lock and the Niagara river or Lake Erie; nor was a western terminus on the Niagara river or Lake Erie ever adopted, determined upon or in any manner located by said Midland Company, (*fol.* 65.)

During 1871 the proceedings were taken as to the consents of tax payers of the Town of Lansing stated in the seventh finding of facts, (*fols.* 65½ *to* 73.)

On the 21st of October, 1871, the County Judge of Tompkins county signed a paper appointing the three persons Commissions who afterwards signed the bonds in question, (*fol.* 73.)

In January, 1872, the Commissioners issued $15,000 of the bonds and in August of the same year $60,000 of the same, with interest coupons attached, to C. P. Wood, the Treasurer of the said Midland Railroad Company, and received in exchange a certificate or scrip for $75,000 par value of the capital stock of said Midland Company, (*fol.* 74.)

The bonds on their face state that they are issued under the provisions of the said act of 1866 and the several acts amendatory thereof and supplementary thereto, *especially the said act of* 1871, (*fol.* 75.) These acts of the Legislature are hereinbsfore referred to.

The plaintiff is not a *bona fide* holder for value of the bonds and coupons in question herein, (*fol.* 77.)

The Court below ruled and decided as matter of law that no *power* or authority was conferred on the town of Lansing to make or issue the bonds in question by the said acts of the Legislature of New York, passed in 1867 or 1869, above referred to, (*See 1 Conclusion of Law, fols.* 79 *and* 80.)

To this conclusion of law no exception was taken, (*See Exceptions, fols.* 81 *and* 82.)

**First.** Lansing is one of the towns of the county of Tompkins, in the State of New York. As such it had no power to aid in the construction of any railroad unless expressly empowered to do so by a statute of the State of

New York. There is no presumption of the existence of such a power in the town; and the burden of proving its existence rests upon the party claiming by virtue of its exercise.

*First Revised Statutes of N. Y. (6th Ed.) p.* 820, §§ 1 *and* 2.
*McClure v. Township of Oxford*, 94 *U. S. R.* 429.
*Township of E. Oakland v. Skinner*, 94 *U. S. R.* 255, 258.
*Town of South Ottawa v. Perkins*, 94 *U. S. R.* 261, 262.
*Wells v. Supervisors*, 102 *U. S. R.* 625, 630.

**Second.** Neither of the statutes in reference to the Midland Railroad Company mentioned in the complaint herein at *folios* 5 *and* 6, enacted prior to Chapter 298 of the Laws of 1871, authorized or empowered the town of Lansing, or any officer on behalf of said town, to aid the New York and Midland Railroad Company in the construction of its road or any part of it, or to issue the bonds in question.

Chapter 398 of the Laws of 1866, (*Vol. 1st of Laws of that year, p.* 874,) authorized any city or town in either the counties of Orange, Sullivan, Ulster, Delaware, Otsego, Chenango, Cortland, Madison, Onondaga, Oneida or Oswego to issue bonds in aid of the construction of the railroad of said Company on the proceedings being had by the taxpayers prescribed by this act. The county of Tompkins, of which Lansing was a town, is not named in this act.

In 1867 a law was enacted, known as Chapter 917 of the laws that year, (*Vol.* 2 *of Laws of* 1867, *p.* 2290). By section 3 of this law the Board of Directors of the said Midland Railroad Company were authorized to construct a "*branch* "railroad from the line of the said road at any point in the "counties of Chenango or Madison *through* the counties of "Chenango, Madison, Cortland, Cayuga, *to the City of Au-*

"*burn*, in the county of Cayuga, whenever in the judgment "of the directors the same shall be for the interest of the "said Corporation." This 3d section then authorized the construction of three other branches in the eastern part of the State, and then continued, "and the towns and cities "along the line of the said *branch railroad*, or interested in "the construction thereof, *in any county through* which said "road shall run, shall have the same right, authority and "power to subscribe stock and to make and issue bonds to "aid in construction thereof, as is given by this act and by "Chapter 398 of the Laws of 1866."

Chapter 84 of the laws 1869 (*Vol.* 1 *of laws of that year*, *p.* 141, *Sec.* 4,) amended Sec. 3 of Chap. 917 of the laws of 1867, above mentioned, by inserting the county of Onondaga as one of the counties through which the said *branch* to Auburn may be constructed. The above mentioned laws are referred to and found in the last half of the second finding of facts, (*fol.* 44.)

Chapter 61, of the laws of 1868, found in the laws of that year, *Vol.* 1, *p.* 90, has no bearing on the question of power in the town of Lansing to aid in the construction of the road or its branches or extension.

Prior to 1869 the main line of the Midland Company's road was located and constructed from the city of Oswego to the city of New York. This main line lies some 35 miles east of the east line of Tompkins county, (*Third Finding of Fact*, *fols.* 46, 47.)

It cannot be successfully claimed that all or either of the laws above referred to conferred any power on the town of Lansing, to make or issue these bonds. Indeed, the Circuit Judge expressly ruled, as matter of law, that the town had no power by virtue of the act of 1867 or 1869 above mentioned, to issue the bonds in aid of the "Auburn Branch," and this ruling is not excepted to. (*1st Conclusion of Law*, *fols.* 79, 80; *Exceptions*, *fols.* 81, 82.)

The bonds state on their face that they are issued under the provisions of said act of 1866 and the several acts amendatory thereto and supplementary thereto, *especially the said act of* 1871, (*Finding of Facts*, *fol.* 75.)

**Third.** The Town of Lansing had no power or authority by virtue of the law of April 5th, 1871, known as Chap. 298 of the laws of that year, to make or issue the bonds in question. (*See this Act, Vol.* 1, *of Laws of* 1871, *p.* 586.) This act is entitled "An act to authorize the New York & "Oswego Midland Railroad Comany to *extend* its road and "to facilitate the construction thereof;" and it was enacted and took effect the 5th of April, 1871. The 1st section of this law contains all that is material to the question at bar, and the material part of this section is set out in the foregoing statement, and also in the finding of facts, *fols.* 42 *to* 44. (*Chap.* 298 *of the laws of New York for* 1871, *Vol.* 1, *p.* 586.)

I. By section one of this act, the Midland Railroad Company was authorized and empowered "to *extend* and "construct their railroad from the city of Auburn, or "from any point *on said road* easterly or southerly "from said city upon such *route and location and* "*through such counties* as the Board of Directors of "said Company shall *deem most feasible and favorable* "for the construction of said railroad, to *any point on* "*Lake Erie or the Niagara River.*" (*See sec.* 1 *of the acts.*) This section further authorizes the Company to construct several specified branches in the southeastern part of the State and to *extend* a branch constructed to Delhi, northerly to another railroad named, and continues as follows: "And any town, village or city in any county "through or near which said railroad may be located," "except, &c. * * "may aid or facilitate the con- "struction of the said New York and Oswego Midland "Railroad and its branches and *extensions* by the issue" of its bonds in the manner provided for in the act of 1886 and the acts amendatory thereof.

The onus was on the plaintiff to establish that the Midland Company took the action required by this law to bring the town of Lansing within its provisions as to bounding.

II. No power was conferred, by virtue of this law of 1871 upon or existed in the town of Lansing or the taxpayers, or the County Judge, to issue bonds in the aid of the construction of *this extension, unless and until* the Board of Directors of the Company had fixed the termini of the extension and *located* the same between such termini; if not through or near the town of Lansing, at least through or near the county of Tompkins. (*See sec.* 1 *of law of* 1871, *set out above.*)

The law does not fix the termini of the *extension or even its general route.* It does not name the counties in which the termini shall be, or the counties, or any of them, through which the extension shall *be located* or constructed. All this, by the express terms of the law, is left to the discretion of the Board of Directors of the railroad company.

This is a very wide discretion as to territory. The eastern terminus might be fixed by the Company anywhere in the counties, of Delaware, Chenango or Madison, and its western terminus in the county of Niagara, on the Niagara river, or in the county of Erie or Chautauqua, on Lake Erie. No one could even guess, with any certainty, through or near what counties the extension would be *located* and constructed, *until both the eastern and western terminus thereof should be fixed by the Board of Directors of the Company.* (*See map of the State of New York, with counties depicted on it.*)

(1.) The construction above insisted upon is in accordance with the language and the plain intent and meaning of the law. (*See sec.* 1 *of law of* 1871, *set out above.*)

(2.) This is the meaning of this law as declared by the learned Judge who tried other cases arising under this same law, after very full argument, examination and consideration.

*Mellen v. Lansing*, 19 *Blatchford's C. C. R.* 512.
*Mellen v. Lansing*, 20 *Blatchford's C. C. R.* 278.
*Thomas v. Lansing*, 21 *Blatchford's C. C. R.* 119.

In these cases the facts were the same as in the case at bar.

The Court of Appeals of New York gave the same construction to this law.

*People ex rel. v. Morgan*, 55 *N. Y. R.* 587, 591.

III. Unless the construction we contend for is correct, then, prior to the determining by the Board of Directors of the eastern and western termini of the proposed extension, and before the *location* of its route, any town in any county in the State, situate westerly, southwesterly, or northwesterly from Auburn, or from a point on the road of the Company easterly or southerly of Auburn, had power to make and issue its bonds by virtue of this statute. This cannot be true. (*See map of the State of New York.*)

The terms *locating* a railroad, or *locating* the *route* of a railroad, are familiar in the statutes of New York concerning railroads, and signify acts required to be done by the railroad corporation.

The general railroad law, enacted in 1850, which authorizes the formation of railroad corporations, and by virtue of which the New York & Oswego Midland Railroad Company was organized, provides that the articles of association shall state, among other things, "the *places to and from which* the road is to be con- "structed or maintained and operated, * * * and "the name of each county in this State through or into "which it is made or intended to be made."

2 *N. Y. Revised Statutes*, (6 *Ed.*,) *p.* 516, *Sec.* 1.

This law also provides that the corporation shall "have power to cause such examination and surveys "for its proposed railroad to be made as may be neces- "sary to the *selection of the most advantageous route*;" and for such purpose it may, by its officers and agents, enter upon the lands or waters of any person.

2 *N. Y. Revised Statutes*, (6 *Ed.*,) *p.* 532, *Sec.* 39

This law also provides that before the Company can acquire land by the right of eminent domain, it must show, among other things, "that the Company "has *surveyed* the line *or route* of its proposed road, "and made a map of survey thereof by *which such* "*route* or *line is designated*, and that they have *located* "*their said road* according to such survey and filed "certificates of such *location*, signed by a majority of "the directors of the Company, in the clerk's office of "*the several counties through or into* which the said "road is to be constructed."

2 *N. Y. Revised Statutes*, (6 *Ed.*) *p.* 523, *Sec.* 15.

IV. The New York & Oswego Midland Railroad Company did not, prior to the appointment by the County Judge of the Commissioners, or prior to the issuing by them of the bonds, or ever, *determine or fix upon the eastern* and western termini of the proposed extension of its road, as authorized by chapter 298 of the Laws of 1871, or *locate* the route of this extension.

(1.) When the application was made to the County Judge to appoint Commissioners to bond the town, and when the Commissioners were appointed and accepted the position, the railroad company had passed no resolution accepting the franchise to extend its road or in reference to such extension, and had done no act in reference to fixing its termini or locating its route or any part of it.

The County Judge appointed the Commissioners on the 21st of October, 1871, (*Ninth Finding of Fact, fol.* 73.)

The first resolution as to the extension, was passed by the directors November 16, 187 1, (*Fourth Finding of Fact, fol.* 48 *to* 50½.)

It is respectfully submitted that in October, 1871, the County Judge of Tompkins County had no jurisdiction to appoint Commissioners to bond

the town of Lansing, and that the appointment was and is void. (*See reference to the statutes, supa.*)

(2.) There was nothing done by the railroad company subsequently by which the *extension* of its road, as authorized by the act of 1871, was *located through or near* the county of Tompkins. (*See Sec.* 1 *of Act of* 1871; *Revised Statutes of N. Y.*, 6 *Ed.*, *p.* 523, *Sec.* 15.

The resolution of November 16, 1871, only declares that the "extension of the said railroad "westerly commence at and from the village of "Cortland in the County of Cortland, and thence "to *Lake Erie or the Niagara River*," (*Fourth Finding of Fact, fol.* 50.)

The western terminus of this extension was never in any way determined or fixed, (*See the Findings.*)

There was no map ever filed in the Clerk's office of either Cortland or Tompkins county indicating the eastern terminus or locating the route of the *extension* from the village of Cortland *in any direction.* The *extension* was never located from the village of Cortland to Freeville, a distance of ten miles, (*Finding of Facts, fol.* 62.)

Nor was there ever filed in the County of Tompkins any map purporting to be or *locating* the *extension*, or any portion of it, through or near Tompkins county. The only maps ever filed in that county was the two filed—the one December 13, 1871, and the other the 22d of the same month. Each of these purported and was certified by the directors to be "Map and profile of a part of the "*Auburn Brench* of the New York & Oswe-"go Midland Railroad as *located* in and through a "part of the County of Tompkins," (*Finding, fols.* 55, 56.)

The two maps filed in Cayuga County, the one December 23, 1871, and the other May 30, 1872, are each certified to be "Map and profile of a "part of the *Auburn Branch* of the New York and "Oswego Midland Railroad, as *located* in and "through a part of the county of Cayuga, New York," (*Finding, fols.* 57, 58.

By these four maps and profiles the Board of Directors *locate* the route of this *Auburn Branch* from Freeville to a point in Cayuga county in Scipio, a few miles from Auburn, a distance of 26 miles; and they show clearly that this piece of road, which afterwards, and in 1881, was continued by another company to Auburn, was no part of the *extension* authorized by the Laws of 1871, (*Findings, fol.* 61.)

The town of Lansing had no *power* to issue bonds to aid in the construction of this branch to Auburn. The law authorizing this branch to be constructed, did not authorize it to be located or constructed into or through the county of Tompkins. (*See chapter* 917 *of the Laws of the N. Y. of* 1867, *vol.* 2 *of laws of that year, page* 2,291, *Sec.* 3; *and chapter* 84 *of the laws of* 1869, *vol.* 1, *p.* 142, *sec.* 4, *amending sec.* 3 *of the laws of* 1867, *above referred to and quoted from.*

V. The map filed in the Cayuga County Clerk's Office, on the 29th of August, 1873, just before the Midland Company discontinued operations, does not aid the plaintiff, (*fols.* 58 *and* 59.) This map was never filed in Tompkins county. It may not purport to locate any part of the western *extension* in or near the county of Tompkins. It purports to locate a railroad from the north end of the Auburn branch in Scipio, Cayuga county, to Mud Lock, another point in Cayuga County. It cannot in any proper sense be deemed the location of a part of the *extension* of the Midland Com

pany's road from the village of Cortland to a point on Lake Erie or the Niagara River. This piece of road indicated by this last map, neither located the starting point or the terminus, or the route of the *extension* authorized by the act of 1871. The distance from Mud Lock to Lake Erie or the Niagara River, is over 140 miles; and the lake and river extends along the western part of the State of New York, for a distance of 70 or 80 miles. There is no pretence of the locating of the locating of the terminus of the proposed extension on the lake or river, or of the route of the extension to or towards either, (*Finding of Facts, fol.* 65.)

We therefore confidently insist that the Court below ruled correctly, that no power was conferred or ever rested in the town of Lansing to make or issue bonds, under or by virtue of the said act of April 5, 1871, (*See 2nd ruling of law, fols.* 80 *and* 81.)

**Fourth.** The consents of tax-payers of the town as required by the statute, as a condition precent to the issuing of the bonds, were not obtained or given; and therefore neither the town of Lansing, nor any one one on its behalf, had power to make or issue them. They were and are void.

I. The said act of April 5, 1871 authorizing the Midland Company to extend its road to a point on Lake Erie, or the Niagara river, declares that "any town, village "or city in any county through or near which said rail- "road or its branches may be located * * * may "aid or facilitate the construction of the said New York "and Oswego Midland Railroad and its branches and "extensions, by the issue and sale of its bonds *in the* "*manner provided for* in the act entitled 'An Act to "'facilitate the construction of the New York and Oswego "'Midland Railroad, and to authorize towns to sub- "'scribe to the capital stock thereof, passed April 5, "'1866, and the acts amendatory of and supplementary "'thereto.'" (*See this act of* 1871, *Vol.* 1, *of Laws of*

*New York for* 1871, *p.* 586, *Chapter* 298, *Sec.* 1.) The material part of this law is set out in the finding of facts, *fols.* 42 *to* 44.

It will be observed that if the town of Lansing, the defendant in error herein, had power to issue its bonds by virtue of the above mentioned law of 1871, they were to be issued in the manner *provided for* by the act of 1866, referred to in *Sec.* 1 of above mentioned act of 1871.

This act of 1866, is Chapter 398 of the laws of New York for that year, and is found in Vol. 1 of laws of that year, page 874. (*Finding, fol.* 44.)

The first section of said act of 1866 provides that on the application in writing of twelve or more freeholders, residents in a town, the County Judge of the County in which the town is situated, may appoint three freeholders, residents of the town, to be Commissioners of such town. The three persons who executed the bonds in question were appointed Commissioners on the 21st of October, 1871, by the County Judge of Tompkins County. (*Finding, fol.* 72; *Declaration, fols.* 10, 11 *and* 12; *Answer, fols.* 31 *to* 34.)

The material parts of the act of 1866, on the question under consideration, are contained in the second section and are as follows: "2. It shall be lawful for said "commissioner or commissioners to borrow on the faith "or credit of such town or city, *such sum of money as* "*the tax-paying inhabitants of said city or town shall* "*fix upon by their assent in writing*, or by votes "respectively, not exceeding in amount thirty per cent. "of the assessed valuation of the real and personal "property of any town, or fifteen per cent. of the "assessed valuation of any city, as shown by the "assessment roll for the year eighteen hundred and "sixty-five, of such town or city, at a rate of interest "not exceeding seven per cent., for a term not exceed-"ing thirty years, and to execute bonds therefor under "their hands and seals. The bonds so to be executed

"may be in such sums, and payable at such times and "places, not exceeding thirty years, and in such form "as the said commissioner or commissioners and their "successors may deem expedient; *provided, however,* "*that the powers and authority conferred by this section* "*shall only be exercised upon the condition that the con-* "*sent shall first be obtained in writing of a majority of* "*the tax-payers of such town or city, owning or repre-* "*senting,* (as agent, president or otherwise, including "owners of non-resident lands,) *more than one-half of* "*the taxable property of said town or city, assessed and* "*appearing upon the assessment roll of the year* eighteen "hundred and sixty-five, which consent shall be "approved or acknowledged in the same manner as "conveyances of real estate are proved or acknowledged "and shall be obtained within two years from the "passage of this act. * * *

"The said written consent of the tax-payers shall "*state the amount of money* authorized to be raised; "and the fact that a majority of the said tax payers, "representing a majority of the taxable property, has "been obtained and acknowledged or proved, shall be "proved by the affidavit in writing of one of the "assessors of the town or city, or by the affidavit of "the town or county clerk, and shall be indorsed upon "or annexed to said written consent, and the said con- "sent and affidavit shall be filed in the town clerk's "office of the town, and a copy thereof in the county "clerk's office of the county, except that in cities it "need only be filed in the office of the county clerk of "the county; and the same or a certified copy thereof "shall be evidence of the facts therein contained, and "shall be admitted in evidence in any court of this "State, and before any judge or justice thereof; and "it shall be the duty of the said assessors and town "and county clerks to make such affidavit when said "consent shall have been obtained as provided in this "section."

This act of 1866 has been amended in some particulars, but it is believed the amendments do not affect the question under consideration. (*See chapter* 298 *of Laws of* 1871, *Sec.* 2, *as to the Assessment Roll.*)

II. By the act of 1866 it is expressly provided *that the powers and authority conferred shall only be exercised upon the condition that the consent shall first be obtained in writing of a majority of the tax-payers of such town, owning or representing more than one half of the taxable* property of said town, assessed and appearing on the assessment roll of the town. (*See section* 2 *of act of* 1866, *above set out.*)

By section 3 of the same act it is provided that the proceeds of the bonds authorized shall be invested in the stock of the New York and Oswego Midland Railroad Company.

Construing the act of 1871 (*Sec.* 1 *above set out*), and the act of 1866 together, it is clear that the commissioners of the town of Lansing could lawfully issue bonds only after the majority of the tax-payers of the town, in number and amount, had consented in writing to aid in the *construction of the extended road of that company* by taking stock in that corporation to the amount mentioned in the consent of the tax payers. (*Section* 1*st of law of* 1871, *above set out, and the title of this act; and also Secs.* 1, 2 *and* 3 *of the act of* 1866, *and the title of this act.*)

The act requires that tax-payers shall in their consent state "the amount of money authorized to be raised," (*Sec.* 2 *of act of* 1866.)

The amount authorized to be raised, stated in the consents in question was $100,000, (*Record, fols.* 11 *and* 12; 31, 32.)

It is submitted that it is entirely clear that the consents must be to issue bonds to take stock in the New York and Oswego Midland Railroad Company, and to

aid in the construction of the extension westerly of the railroad of that company, and for this purpose only.

III. The consent in writing of a majority of the taxpayers of the town owning or representing more than one-half of the taxable property of the town, was never given or obtained as required by the statute. (*See Sec. 2 of the act of* 1866 *above set out.*) There was no power or authority therefore in the town, or in any one on its behalf, to make or issue the bonds in question, and they are void.

(1.) The so-called consent of tax-payers consisted of six papers, each signed by different tax-payers of the town. Four of these six papers were dated June 24, 1871, and by these four the signers thereof consented to the making and issuing of bonds on behalf of the town to the amount of one hundred thousand dollars, to be used in the construction of the New York and Oswego Midland Railroad. The signers of these four papers did not constitute a majority in number of the tax-payers, nor did they represent one-half of the taxable property of the town.

The signers of the other two papers of the six constituting the consents, did not consent to the issue of bonds to the amount of one hundred thousand dollars to aid in the construction of the Midland Road or its branches or extension ; but expressly required $25,000 of the bonds to be applied upon a line of railroad direct to Ithaca.

Neither set of consents contained the names of a majority of the tax-payers of the town, or the names of tax-payers representing one-half of the taxable value of the property of the town, (*Findings,* 65½ *to* 68.)

It does not appear that there was any company organized or authorized to construct a railroad

direct to Ithaca; and it is expressly found "that the line of railroad direct to Ithaca mentioned in the consents was never located or built," (*Findings of Facts, fol.* 67.)

It is found that it required all the signers to the two sets of papers to make the required majority of tax-payers in number and amount of taxable property, (*Finding, fol.* 66½.)

IV. The tax-payers did not consent to the issue of bonds to any amount to aid in the construction of the railroad of the Midland Railroad Company, except as a part of the scheme to build a railroad to Ithaca, which had never been authorized by law, (*See Finding, fol* 66.)

The consents are no more a compliance with the statute than if a portion of the tax payers of the town had been induced to and did sign the consents as part of a scheme by which one-fourth of the money mentioned in the consents should be appropriated to build a church or college.

The intent and meaning of the statute, is that to authorize the issuing of bonds, a majority of the tax-payers should consent in writing to the raising of a sum specified in the consents, to aid in the construction of one railroad named therein. It would be contrary to the language and intent of the statute, to permit a proposition to aid a railroad which could not, on its merits obtain the consents of a majority of the tax-payers, to be "log-rolled" through by coupling it with and making it part of a scheme to raise money for another and unauthorized and illegal purpose.

**Fifth.** The plaintiff was not entitled to recover on any theory that he was a *bona fide* holder of bonds.

I. Where a municipality issues its bonds without any authority to do so they are void in the hands of a *bona*

*fide* holder for value parted with; the authority to contract must exist before any protection to an innocent purchaser can be successfully claimed. This is the settled law in this Court.

*Marsh v. Fulton Co.*, 10 *Wallace*, 676, 682.
*Township of Oakland v. Skinner*, 94 *U. S. R.*, 255.
*Town of Ottawa v. Perkins*, 94 *U. S. R.*, 261.
*McClure v. Township of Oxford*, 94 *U. S. R.*, 429.
*Wells vs. Supervisors*, 102 *U. S. R.*, 625.
*Hayes v. Holly Springs*, 114 *U. S. R.*, 120–126.

II. But the plaintiff in this case was not a *bona fide* holder. The finding of the Court below is that he was not. (*See Finding, fol.* 77.)

**Sixth.** The town was not estopped from alleging want of power to issue the bonds by anything recited in the bonds, or by the payment by the town officers and Commissioners of two or three semi-annual instalments of interest. Where the town has no legal power to issue obligations, its officers cannot, by their acts, render them valid, (*Finding, fol.* 76).

10 *Wallace, and other cases supra*
111 *U. S. R., p.* 83, *Dixon County vs. Field.*

**Seventh.** Nor did the acts of the town or its officers ratify and thus render the bonds valid. Where there is no *power* in the municipality to create the obligation, it cannot, by acts of ratification, make it obligatory.

10 *Wallace*, 676, *and other cases supra.*
111 *U. S. R., p.* 83, *Dixon County vs. Field.*

**Eighth.** The judgment of the Court below should be affirmed, with costs to the defendant in error.

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